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Devises

The term "devise" when properly understood signifies a mode of alienation or testamentary disposition of real property to take effect in possession after the death of the owner. Paus C 10. 5 Ba 49.

Wills are the instruments by which a person conveys personal property - a testament differs from a will in this - in a testament no Ex. is appointed in a will there is one & both differ from a devise in this - a devise is a disposition of real - the two others a disposition of personal property. Sock. 2. Want. 2. 2 b2b - 685

The right of devising is said to have existed among our Saxon ancestors before the Norman conquest introduced the feudal system in its full rigor - upon the introduction of this tenure it was abolished - so by law this right of devising real property does not exist - tho it was preserved in particular districts by custom or particular privilege of the conqueror. 2 Bl. 57. 373 - 1 Cal. 237. Prec. 1. 3. 5

Terms for years being chattel interests were not affected in this particular by the feudal tenure. 2 Inst 7. 2 Bl 374.

The suspension of this right of devising continued till the reign of H. 8 - this exploded by the introduction of uses which were an estate distinct from the legal interest which gave rise to the practice of devising to the use & Chancery would decree in compel the cestui que use to execute the devise & even to convey for his benefit - But when the Stat. Uses was annexed the possession to the use then uses became no longer transferable & consequently extinguished this kind of devise & but on the Stat. Wills 32 H. 8 - & explained by 34 H. 8 which gave to all persons (except sec. Pow

tenure in joint tenancy) in possession of lands in fee simple a right to devise under certain restrictions. The explanatory Stat. 34 H 8. excepted feme covert, infant & persons of non sane memory. Dow 9 Mo. 216. 2 Bl. 99. 375. Hena 414

By Stat. 12. Car 2. all lands except copyhold are made devisable by whatever tenure they are holden (2 Bl 99. 375. Dow 10. 412.) The 29. Car 2. regulates the execution of devises.

The Stat. Devises in Ct. is similar to that of H 8. but extends the privilege of devising further (Stat. Ct. 42.) We have also a Stat. similar to that of Jame in the Stat. Frauds regulating devises. Both Stats. being borrowed from the Eng. Stats the construction given to them in the Eng. courts is considered as binding here. Stat. Ct 257. So may Feme Covert devise here. Sr. Ct.

The power of devising depends upon the Stats. H 8 & the forms & solemnities above of making them are regulated by 29 Car 2. 2 Bl 276 Dow. 1. 7. 8.

Under the Stat. H. 8 a devise is called an irregular instrument in writing because the Stat. H 8 prescribed no form of words in which a devise should be made. Courts therefore in the construction of these Stats. held that any instrument in writing which manifested the intention of the devisor to dispose of his real property executed according to law was a valid devise. Thus they held that an instrument in the form of a deed under this stat manifesting the intention of the devisor to devise his property was a good devise. Dow 12. 18 3 Rel. 310 1 Ch. C 248 Finch 195. 1. Mod 117 Doug. 377.

A devise may be written at different times on different pieces of paper

0-1.

it is not necessary that they should all be joined - if the intention of the testator to devise is clear the whole together will constitute his will & be so considered Paw 15-682 Cowl 174 1 Show. 69.

A man may make several partial dispositions relating to several parts of his estate by distinct instruments & the written on distinct pieces of paper. Ex. Devise of lands to testator's youngest son & his heirs - Afterwards some lands are devised to testators wife for life she paying a rent to the son - Both stand as if made in one instrument - Paw 18-19. Cro E 721 - 1 Ves. 187. The last is in effect only a revocation pro tanto - So a latter instrument may on the same principle modify or devise made in a former one - Ex. It may diminish the former or annex a condition to it. Paw 14-20 - 2 Atk - 258

So a devisor may under these Stats. by a reference to another instrument (as a deed) make that for the purpose of explaining his intention a part of the devise - Ex. "I devise to S. S. all the rents expressed in a certain deed" - So of a direction by testator to exs. to dispose of a certain sum as he shewth by deed appoint - & he makes the appointment - Paw. 22-3 Noy 117 2 Atk - 273 P. Co 530 - vid - Paw - 48-9. 2 Ves Jr. 228 -) So after a will or codicil is made & published testator may or make a codicil explaining altering restraining or enlarging the disposition before made. (Paw. 24 -) The law annexes the codicil to the devise & considers both as one instrument. Paw 23 - 543. 2 Ves 242. Pr. 187).

By a codicil is meant an appendage to a will or devise explaining &c Paw 23-4

Devise to A for Life remainder to "the surviving children of B" held that the word "surviving" referred to the death of the testator & not to that of tenant for life 15 C.L.R 207 3 H.R 488 3 Burr 1881 3 East 278 Coupe 309

But a mere recital in a devise of something contained in another instrument is not itself a devise. 2 Vent 56.; Sha. 427. Com 232.

In the construction of Sts. 34.8 - it was holden that every devise of lands &c must be entirely in writing (Pow 25 - Rowd. 3145) but the Judges took the word writing in its most extensive & vague sense as including loose notes & even letters expressing owner's intention (Pow-25-6 2 Bl. 376 Mo 177. Dy 72 Cro E 100.) Indeed it was holden unnecessary that the writing should be made or authorized by devr. A devise written by an Ettr. in pursuance of instructions by devr but in his absence & not even read to him was good - Pow-26. Dy-72 -

So it was holden that if one in extremis had declared his intention to devise by parol & another without any direction or authority had reduced it to writing in the owner's life time it would be a good devise (Pow 26. 1 Sem. 79 B-113 - But these two last opinions were soon overruled (Pow 26.8 Cro. E 100 - Dy. 72 - 2 Rol. 3145 - 1 Sem. 113.) & it was holden that the devise must be completely reduced to writing during devrs life - Seems void - Ex. If a devise was made to J.S. & his heirs upon condition & before the condition was written devr died it was all void Pow 28.9. Dy. 72 - 3 Co. 31. 1 Skin. 72 -.

But when devr directed several distinct devises & after one was completed but before the other was written died - the former was adjudged good - Pow - 29. 3 Co 31.

So it was holden that a devise might be good in part & void in part - Ex Scrivener annexed a condition to the

Estates not devisable

A mere adverse poss.n - altho. there be an actual disseisin does not affect the validity of a devise 2 Mand 204 1 Saunt 604. 613 1 Johns Cas 33. ibid not 534

devise without authority - condition void - devise good (Pow. 30 Dy 72 -) Seem where the direction was to dev. on condition & the devise was written without condition (Pow 30 1 Rel. 888 no 356 -) Where the devise is not written in testator's life time -

Signing by dev.

holden unnecessary under these Stats - not necessary that his name should appear on the instrument (Pow 30. 1 1 Sid. 362 2 Leon - 35 - 3 Ch. 79.) Indeed it was holden that any writing tho neither signed sealed or written by dev. was sufficient & that the evidence of one witness was sufficient to establish it (Pow 31. 2 Rel. 128 1 Sid 315 -.

Interests and Estates not devisable

formerly holden that contingent interest resting merely in possibility could not be devised under the Stat of wills (Pow 34. 3 Lev 127 Fearne 291.) Now settled that they may be - that is - possibilities coupled with an interest are devisable before the interest vests - Seem of naked possibilities Pow. 34. 234 209 Fearne 441. 3 B.R 88.90 4 - 248. Bl. R 222 - 1 Hb Bl 30. 1 Fonb. 203. q.

But an estate which is turned to a mere right is not within the provision of Sts - 34.8. as a reversion discontinued. & Tenant in tail & the reversioner join in a lease for life - Rever. cannot devise the reversion - it is discontinued. Pow 35-6 Cro E - 281. 93 387. 405 see 2 Bl 198

An estate per auter vie is not devisable under the Sts 34.8. for they are confined to persons having band fe. in fee simple. Pow 34.7.8. 218. 1 Roll 334 Cro E 58 -

Estates not devisable.

Co L. 46. 2 Roll. 150. Palm. 32.) So of an estate per reciprocal lives Raw 37. 3 Rel. 450 (Ver 428) So of a base fee or freehold descendible per cuter vie - Ex Tenant in tail grant to A & his heirs - A cannot devise his interest. Raw. 36. Cuter 208 - 211. Popph - 91. Cy. 253 - But now by Stat 29 Car. 2 estates per cuter vie are devisable. (Raw 37.8. 2 B) 259) whether there is a special occupant or not -

Our Stat - it seems authorizes devises of estates per cuter vie - The words are "shall have power &c to make their wills &c of their lands & other estates" - which seem to include all estates which may continue after the owner's death & to which no other person has a claim which he (the owner) could not defeat by his own act - It does not then include estates tail - Stat. Ct. p. 2 by this section of our Stat. it seems that one may devise any interest remaining after his death which he might have transferred by deed in his life time. Stat Ct. 21

Dignities offices & franchises tho they may be descendable in Eng. are not devisable - not within the Stat. 36.8 v 1 Raw. 40.1 3 Co. 32 - 1060 81.

Inst. offices are strictly personal except that in some cases it may be exercised by deputy - not devisable or descendible -

Copyhold estates not devisable in Eng. - There must be a surrender to the use of the will - not within St. 36.8 - Raw 10. 115 - Ward Inst. 135 -

Right of re-entry on lands depending on the non performance of a

Subject matter

condition by grantee is not demable for he has not the land till breach of condition – no estate in the land strictly speaking (Paw. 183. (Ves 223.1.22.) Strictly personal in Grantor & his heirs.

Of the devise and subject matter of devises within the English Statute of Frauds and our own

The clause relating to this subject in Eng. Stat. of Frauds &c. enacts "that all devises of lands &c. shall be in writing & signed by the party or some other person in his presence & by his express directions & subscribed in his presence by three or more credible witnesses" Paw. 117. – 2 Bl. 376

Our Stat. enacts that "no wills &c. whereunto there shall be any devise of real estate shall be held good &c. if they are not witnessed by three witnesses all of them signing in the presence of the testator (Stat. Ch. 257.) Substantially the same with the Eng. Stat. except there is no express provision made with respect to testator's signing – Same rule however adopted by our courts (I suppose) as to testator's signing.

The object of these provisions is to guard men in extremis against fraud & to protect heirs at law. Paw. 117.

"All devises &c." – No form being prescribed any more than in the Stat. H. 8 any writing which would have been good as a devise under the Stat. H. 8 will now be valid if the solemnities prescribed by the Stat. Frauds are observed – that is – if signed & witnessed as the latter Stat. requires (Paw. 118. 9.) Hence as under the Stat. H. 8 a devise executed according

Subject matter

to the Stat. may by reference to another instrument make the latter a part of itself tho the instrument referred to is not thus executed. Ex. A by devise duly executed under this statute changes his land with legacies & then with another instrument not thus executed gives legacies - these legacies will change the land - Paw. 19. 48. 2 Atk. 368. 1 Ld. 423 - 2 Atk. 204. 3 Burr. 1775.

"of any lands or tenements" - Description of the subject matter of the enacting part - Paw. 52 - Words in our Stat. "Lands & other estate" St. Ct. 23. & "real estate" St. Ct. 257.

Decided that the Stat. does not extend to such Eng. colonies as were planted before the Stat. passed - Semble as to those settled afterwards Paw 52. 2 P. D. 945 - Compare 204. Sat 211 1 Luch 131. 380. 90 Hilly. 389.

But a devise made in a foreign country of lands lying here must be executed according to our Stat. (Paw. 52 - 2 P. D. 291) Semble in case of personal property it has no locality 1 H. Bl. 690 Amb. 25 - follows the person -

These words do not extend to copy-hold lands - Paw 53 Cro. L. 44. 81. R. 1111, 2 Ves 498.) nor to a bequest of a chattel interest Paw. 55 - Gilb. R. Eq 169.

A trust of an inheritance is within the Stat. (Paw. 57. 3 Atk. 152 - 2 P. D. 258 -) So also an appointment of land under a power if made by will. & both must be executed according to the Stat. Ex. An estate is conveyed to such & trustees to such uses as A shall by will appoint (Paw. 148. 9 58 - 150 - 1 P. D. 740. 2d. 258 - 2 Ves. 179) By "will" is meant

Solemnities.

such a will as is proper for disposing of land - mistaken the same -

A writing importing to be a will if used as such cannot operate as an appointment - Sees the mischiefs to be prevented by the Stat - made annul. Pow 58. 2 Ver. 597) & if a legacy is given originally out of land the will creating the charge must be exd according to the St. but charge is in effect a disposition of part of the land by devise (Pow 59. 2 Lith 268. 85) Different from the case of an instrument referred to in a devise - So rents arising out of land are within the Stat (Pow 59) "Incident follows the principal" -

So a will giving power to Exors to sell land must be executed according to the Stat (Pow 59. 2 Ves 179) for this is indirectly disposing of land - that is - enabling others to do it -

The Eng. St. Frs extends to all devises of lands & tenements devisable either by itself or by the St. Wills or by any custom Pow 59 -

Solemnities required by the English Statute and by our own

1. The devise must be in writing - This is requisite under the St. of Wills - (Pow 60. 25 - Plowd 345) It is also necessary under our Stat - tho the word "writing" is not used (Bl. Ct 23. 25). (1 Sw 326 -) but the provision as to witnesses implies that it must be written - This rule needs no illustration further than has been given note the instrument - enter Sealing tho usual is not necessary - Coup 264 -

2. Signed by testator or by some other person in his presence & by his express direction. Pow 47. 60

Solemnities

à non requiré Ff. 195.

× Signing not expressly required by our Stat. but in the construction the rule of the Eng. St. as to signing is followed - (1 Sw. 326.) of course our law under this head is the same as the Eng.

Sealing is usual in Ct. but not necessary either here or in Ct. Eng. Sealing in case of deeds is a feudal solemnity - mark of distinction between families - Pow 61. 76 Gilb. R. Eq. 261 1 Sw. 326 Conf. 264

Signing What? It has been holden that sealing alone amounts to signing within the Stat. (Pow 62. 3 Lev. 1. 3 Mod. 219. Court divided 3 to 1. Same point holden by Le Roy 2 Strange 64 Pow. 66. Holden contra 25 Geo 2. Pow 67. 74. 1 Wils 313. The latter seems the better opinion - the former facilitates the forgery of devises - Sealing was not intended as a substitute for signing & to adopt such a construction generally would lead to dangerous consequences.

But the name of testator written by himself in any part of the instrument is construed a signing unless it appears that it was intended otherwise - 2 Bl 377. Ex. "I A B." make for Pow 61. 3 Lev. 1. 3 Mod. 219. 1 Eq. C. 403.

But if it appears that the name written in the body of the instrument was not intended as a signing it will not operate as such - As if there was an express intention to sign formally & this intention was defeated - Ex. The devise being in five sheets testator signed the two first & attempted to sign the others but failed (Doug. 229. 411. Pow. 65. 1 Fonb. 180.

Solemnities

The onus probandi in this case lies upon him who opposes the devise - the presumption of law (the intent to devise being certain) is that the name written in the body of the instrument was intended to be a signing. Paw 65-

Devise subscribed by three witnesses & declared in their presence to be his will tho not signed by him holden well executed - 1 Ves Jr 11. qu.

"Attested and subscribed in his presence by three or more credible witnesses" - The general object of this clause is to prevent the frauds consequent upon the secret execution of devises. Paw. 68. "Credible" Burn 49. Paw 113.16. post 524

The attesting witnesses are to attend to three objects - 1. Sanity of testator - Paw 68 - 2. The fact of signing - Paw 69.70. - 3. The fact of publication Paw 80 -

1. Sanity or the state of mind - of this they are to judge - for the signing which they are to attest includes in law not only the physical act of writing testr's name but also the mental power or capacity of making a legal & effectual signature - An idiot may write his name. (Paw 69. 71. 3 P.W. 93. 8 Vin 169 pl) And when the devise is offered for probate testator's sanity must be proved - onus on devees - proving the exn to have been formal not sufficient - Paw 69.70 2 Atk 56 - Bull 264 - 1 B.R. 365

Hence a court of Chancery will not establish a devise unless all the attesting witnesses are examined - for the heir has a right to require proof of testator's sanity from each of them - (Paw 70. 3 P.W. 93) As to giving it in evidence at law

Solemnities.

see - post 521, 524. Probate in Ch^y forever conclusive. But the testimony of subscribing witnesses is not conclusive as to testator's sanity or signing - or even as to their own subscription. Bull 264 Stra. 1090 -

To attest the fact of signing by the testator -

Not necessary however that the witnesses should have actually seen testator sign - An acknowledgment by him to them that his name appearing on the instrument was written by himself is sufficient as to this purpose - Pow. 7. 8. 3 Lev. 1. 6th Ch. 184 - 2 P. Co. 506 - 2 Ves 455 3 P. Co 253 Doug 232 - or 241.

But testator's saying "this is my will" is not per se a sufficient evidence of signing - Semb - not an acknowledgment of that fact (Pow 78. 2 Litt 182 -) may be the circumstantial evidence of the fact - But it seems that a written declaration in the hand writing of the dev^or that his name was written by himself is sufficient evidence to the jury of the fact of signing - an implied acknowledgment Pow. 76. 8 - Shum. 227. Com. R. 197. Ex. "Signed" for "as my last will" - Sed qre - whether an actual acknowledgment is not necessary (Pow. 80 3 P. Co 254) no direct decision - 5 Mss 219

They are to attest the publication

(publication was necessary before the Stat. 1st V. & is still holden necessary (Pow 80 - 3 Litt 156) analagous to the ceremony of delivering a deed. Pow. 86 -

By the publication of a will is meant

Solemnities

some act by testator amounting to a declaration that the instrument is his will (Pow 81.) No form of publication necessary - Any act or declaration importing a solemn intent in testator to dispose of the estate by the instrument is sufficient - (Pow 81. 8 Vin. 125 -) Hence delivering the instrument as a deed has been holden a sufficient publication (Pow - 81.8. 125 -) So holden in a case where the witnesses were deceived & supposed the instrument to be a deed Pow. 81.2 - 1 Burn. E.L. 117) So declaring to the witnesses "this is my last will" &c is sufficient (Pow. 82. Swinb 82 - So publication may be inferred. Ex. Where the form of attestation was in testator's hand writing & in these words "signed sealed & published & declared &c in presence of us" & he said to them "take notice" - it was holden a sufficient publication Pow. 82.6. 1 Burn. E.L. 111 -

But the publication must be in the presence of three witnesses. (Semb) at least this is holden necessary as to republication (Pow. 66. Com Dig 381) Not necessary that they be subscribing witnesses.

Necessary that the whole will be present at the time of attestation - If it is in several parts one of which is attested by witnesses who never saw the others it is not well executed (Pow 87. 3 Mod 263. 1 Eq. C 403 -) But unless there is positive proof that the whole was not present the jury may from the circumstances of the case presume that it was present - it is a question for their consideration Pow 87.8 - 3 Burn 1773. Bl. R 407. 22. 54 -

As to

the subscription of the witnesses - Holden that if a devise is made on three sheets of paper not joined & each witness subscribes one sheet the subscription is sufficient (Pow 89. 101-108 - 082. 90. Burr. 1775 - 2 Bl. 377. Burr. 548 - 3. Mod 263 Freem. 486 Pr. Ch. 185-270. Carth 27.) So if the loose sheets in this case were wrapped up in a blank paper their subscriptions their subs upon the blank paper it is said is sufficient. Pow 90. 682.) Sand. not - opens a door for fraud.

In presence of testator

There moves holden synonomous with the words "within the view" &c - If they subscribe within his view the subscription is sufficient Pow. 90. 2 Bl 377.

By the word "view" is meant "possible view" - for if testator might have seen the witnesses subscribe the subscription is in his presence (Pow 90. Sal 395 - 688 Carth - 81 Eq C. 403) Ex - where he might have seen into a gallery thro a glass window.

So if the curtains of his bed are closed yet a subscription in the same room it is said is sufficient (Pow 92 Sal. 395.) because it is in his power to see them - Not necessary that testator & witnesses be in the same room - Ex. She in her carriage - they in an Atty's office. Pow 92 - 1 Br Ch 99

But the subscription thro in a contiguous apartment is not good unless the testator might have seen it - Pow 92-4. Carth 79. Cowb 156 -

1 Shaw. 89. Holt 222 - 1 P.W. 239.) Tho the witnesses retire to subscribe at testator's request the above rules apply Pow. 91, 5 - 2 Shaw. 288 -) for this clause it seems is intended to prevent not only fraud but any mistake as to the identity of the instrument. 2 Bl 377. Pow 98 Doug. 232 -

If then testator is insensible at the time of attestation the corporally present the attestation is not good - "His presence" implies in construction a mental presence also — a knowledge of the transaction - Pow 96 - Doug 229. or 241

So tho the attestation is in the same room with testator & he be of disposing mind yet if executed clandestinely - not suffn. - not in his presence within the meaning of the Statute - ignorant of the transaction (Pow 95 - 1 Plo 740) Tho the witness must subscribe in testator's presence yet the fact that the subscription was in his presence need not appear on the face of the instrument - It is a fact for the consideration of the jury - Indeed if stated in the instrument it must be proved (Pow 78. Com 531 Bull. 264 Sta 1109 or 109. 8 Vin. 128.) If the witnesses are dead jury may presume the fact

By three or more credible witnesses

Under these words it has been decided that if a devise is subscribed by A. & B. - & afterwards a codicil by B & C the devise is not signed by three witnesses within the Statute Pow 110. 60. 680. 2 Carth 35 - Holt 742 Comb. 174. 3 Mod 202 -

and that if a devise is not witnessed a codicil with three witnesses will not make it good 2 Ver 597. Pow. 680 – qu as to the principle. It does not appear except in one case (Com R – 384 – Pow. 104) that the devisee was present when the codicil was executed. see SR 1110.

The decisions however appear clearly to have proceeded upon the distinction between a devise & codicil & a devise made at several times & in several distinct parts – Pow 108 – 686 – 1 Burn 551 – in which last case an attestation of one part is sufficient – What is the difference? for the will & codicil constitute but one instrument Pow 23 – 543 –

A codicil (I suppose) is considered as being intended to effect an instrument already completed not to consummate the instrument or to give it validity – Attestation of the codicil therefore not effectual as to the original devise – Pow 680. P Ch 270. 2 Ver 597. But an attestation of one part of the original devise is intended to give authenticity to the whole. But when there is a will & codicil on one piece of paper the qu. – whether the subscription of the witnesses belongs to one or ~~the other~~ to both is a fact to be determined by the jury (Pow 106 Com R 197) who usually generally give in favor of the devise.

As to the question whether a subsequent writing is a codicil or a distinct part of the original – it seems that if the subsequent part relates to the personalty only & is executed according to the Stat – this circumstance furnishes presumptive evidence that it was not intended

as a codicil. Pow 109 1 Burr 554 -

Not necessary that the witnesses subscribe in each others presence or at the same time (Pow 110. 2 Ch.C. 109. 3 Burr 1775 - 2 Ves 129. 1 P.Ch 184 2 Ch.R 177 not required by St - But it is most safe - for the oath of one witness is sufficient to prove that all signed in the presence of testator but unless all were present together proof cannot thus be made (Bull 264 Pow 108 1 B.R 365 - 4 Burr. 2224 1 P.Co. 741 1 Ford. 184) and if even one is living the hand writing of the others cannot be proved (Pow 109) in such case proof that the others signed in testator's presence cannot be had unless all were together Pow 113. 720

Note the difference between proving the exn & attestn of the devise in a particular suit at law which it seems may be done by one witness (Pow 108 1 P.Co. 741.) & the establishment or formal probate of it in Chancy for which purpose all must be examined. Pow 70. 718 1 Wil. 216 1 Ves 177.) In Ct the practice is (M.R. thinks) to call but one to prove it -

Credible witnesses

"Credible" not in our Stat 1 Who are such? The word "credible" seems to be unmeaning - The credibility of witnesses never enquired into (1 Burr 419.) It is not synonomous with competency tho' here it seems to be so used - If it means competent it is unnecessary - Competency implied in the word "witnesses" 1 Burr 17. 18 Pow 133 -

Decided that a devisee is not such a witness as the Stat requires - clearly so as to his own devise - One who

is no witness cannot be a credible witness (Pow 114.16 - Com. R 94 - Carth. 514 Sd. R 565 12 Mod. 277. 1 Freem 510 - 3 Interested Stra 1253 -) The rule extends to interested witnesses generally - 'Is he a good witness to the other devises in the same instrument? post - So doubtless of persons rendered incompetent by crimes - cannot give evidence of their subscription (Pow 116 - 130 4 Burn E.L 93) as where before attestn witness was convicted of larceny -

2. Can a subscribing witness who is a devisee or otherwise interested at the time of attestation be rendered competent by any thing ex post facto (as by release) so as to establish the devise? In other words - if the witness tho interested at the time of attestn is competent to testify at the time of examination can the devise be established? (Pow 113) Is it well attested? -

Holden dicta by Lee Ch.J. that the witness must be competent at the time of attestation. Stra 1253. Pow 116. 2 Sunges contra - The witness's wife had an annuity charged on lands - not released - interest subsisting as in Hilliard vs Jennings - this case was carried to the Exchr Chamber - difference of opinion - Case compromised - Pow 120 1 Ves 503 -

This qu was directly decided in favor of a devise under such circumstances in Windham vs Chetwynd - This case I think is correct - 1 Burn 414. Pow 121 -) The witnesses were all creditors - the debts charged on land - paid before time of examn - Devise holden duly executed - Same opinion manifested by Ld Hardwicke in Price vs Lloyd - 1 Ves 503 - 2d 378 - Pow 120 -

Case of Ld Aylesbury's will in point to the same purpose cited 1 Burr 427. & Pow 135 – The witnesses all had legacies charged on land by two wills – Indifferent to them at testator's death (not before) which was established – Previous bias

Same point decided in Shindon vs Berney Pow 130 – (Pratt Ch J contra * where argument was ingenious & powerful but very fallacious – Pow^l statement of authorities pa 113 not correct – omits L^d Ch^r mill supra – & says three Judges were with L^d Ch^r when there were but two & they were opposed to him – (Powell is a respectable authority when he does not oppose Ld Mansfield says G –) Wadsworth vs Camp decided in favour of the devise by Lord C – Reversed by Ch. Ex. 1799 – Cited 1 Day. R 111 – 2 n

3. It is questionable indeed whether the devise to the witness is not void ab initio so that he might testify as to the others without a release – respectable opinions in favor of this 1 Burr. 428 1 Ple. 337. Cath 514 – Not positively settled Stra 1258 – (Decided contra in Wadsworth vs Camp – weight of Eng. author^s in favor of this opinion – Stat. in Eng^d settles the qu^n – no so here – Eng. St. declaratory – I think on principle the legacy is void in Ct where no Stat. So here now St 1958 S 3.

The St. 25 Geo. 2 (being declaratory) is an authority in support of the opinion that the dev^e to a witness is ab initio void & therefore that he is a competent witness – That it is declaratory see Pow 122. 9. 33 5 Bac 516 – but see Pow 133. 4 where he falsely says this Stat. is opposed to Mansfield's opinion as expressed in Windham vs Chetwynd – ante 525

(Devises)

Short Stat. provides that devises & legacies to attesting witnesses shall be void & they admitted to testify, & that creditors whose debts are charged upon testator's lands & who are witnesses shall be admitted as witnesses notwithstanding. Pow 123 - No such Stat. here.

Gen. principle of C.L. that a release only ~~an interested~~ interested witness restores him to competency - Pow 121 Doug. 134 - Lo Ray. 730 Obj. Temptation to fraud at the time of attestation. - What then? Same objection in every case at C.L. - Stat. Fr. intended to regulate rules of evidence in Cts. - Obj. Practice furnishes bribe (So in every case - Obj. Idiot lunatics infants - they could not judge of the exn. - Suppose same case at C.L. - Obj. "three Englishmen" required (1 Qualification is intelligible as referring to attestation. - 2. But "competent witnesses" is not -

But a legatee (or devisee) is a good witness against the will agst. his interest. Pow 135 - Sed 691 -

An Exr. having no beneficial interest under the devise is a good witness to prove testator's sanity (Doug. 134 - Esp 489.) So a legatee who is a subscribing witness is competent if it is indifferent to him whether the will stands or not - Ex. If he has same legacy by two wills to one of wh. he is a witness Pow 135 - 1 Burr 427.

It seems that a testamentary disposition of real & personal property may be good as to the latter & void as to the former - Pow 118 Str. 1253 for want of due attestation.

Co Litt 514 - 4 Ves Jr 200. 319. 27. 32-7.

Who may devise

The Eng - rule is that all persons who may convey & are not disqualified by C.L. or by the express words of the Stat. of Wills may devise. Pow 139.

By the words "all persons" in the St. 32. H. 8 are meant natural persons as distinguished from civil or bodies corporate. - Corporations cannot devise under this Stat. Pow 139. 1 Roll 608 3 Com 141.

As to natural persons there are four positive disqualifications in St. 32. H. 8 as explained by 34 H. 8. - 1 Infancy - 2. Idiocy - 3 non sane memory - & 4 Coverture Pow. 140 Cy 354. 1 Ves 300 - All C.L. disabilities -

(According to the construction given to our Stat. all persons who before the St. could devise property which was devisable at C.L. - can devise their lands &c under it (All persons &c not otherwise legally incapable" &c.) sed qu - I know of no such rule -)

1. In certain parts of Eng. infants may devise by custom Pow 143-4 Perk - § 221. No such custom here - Full age is completed on the day preceding the 21. anniversary of one's birth - Scot 44 - 625 Co - R 450. 1096 Pow - 086 - 144 - 1 Sid 142 - Bacy 84 1 Rol 589. post

2 An Idiot is one who has no understanding from his nativity - a natural fool (1 Bl 303 Cy 143. Pow 144) A person is not an idiot if he has "any glimmering" of reason as if he can tell his age count 20 &c Pow 145 4 N.B. 233 -

Devises

3. A person of non sane memory (tho not an idiot) cannot devise (Pow 115 - Cro J. 497. Dy. 118 -) By these words is meant insanity or mental derangement in gen.l - Not sufficient that testator can remember common events - He must have what is called a disposing memory - that is - understanding sufficient to make a reasonable disposition of his property Pow - 116 - 1 Co 23 (Dy 72 - Mo - 760) No definite rule as can be given -

What is a sane or disposing memory is a question to be determined by the rules of L.L Pow 116 . 1 Co 23

4. A feme covert cannot devise in Eng.d - her acts considered to be done by hus.d coercion - she wants free will (Pow 116 1 Co 61 - Hob 225 Co L 112 Dy 354. 34 - Swinb - 88 -) Expressly disabled by St. H.8 - Pow 110. (But by St. Ct. she is enabled to devise) It has been holden that a custom for a feme covert to devise was not good "unreasonable" - "coercion" Pow 117. see 3 Com 14 -) I think clearly a feme covert cannot devise at C.L - too late to go back to original principles as Sheere does after so many decisions & so long acquiescence in the rule - -

Denied in Ct. that a feme covert may devise her property real even to her husband - 6 Eng. 1780 - S.C. contra Thirly 195 - 1138 For she may at C.L devise what is devisable at law so far as the husband's rights would be affected by the disposition (Ayer - 2 Lev 552) Lt Property to her sole & separate use if not real - 1 Ves 518 - 303 - 2 Ves 75 - 1 Bro. Ch 10 3 Lev 695. 709. P. Ch 204 1 P.Co 126 - 710 2 Ves 82 - 316 - - Obj - She cannot bequeath personalty without husband's consent - Peck 502 2 Bl 1198 Stra 891

This rule relates it seems to personal property belonging to the husband by marriage - Bracton 80 - or which he has a right to control qu - 2 East 552 - 1 Rose H.L.L 111 "Because it would be a wrong of his goods" (cites Bracton - 1 Rose H.L.L 307 4.73 111 is express to this purpose - So of her pers rationabilis anciently - P. 307. So according to some of her paraphernalia - qu P. 307. 5 Bac 498 -

So she may appoint an Ex. of goods & chattels which she takes as Ex.ix without husband's consent 2 East 552 - 1 Cannot bequeath them indeed even with his consent (as they are not devisable - 5 Bac - 498 - 2 Ba - 49. Plowd - 526 - 2 Mo - 340 - 1 Roll 608. 912 -

There seems then to be nothing in the constitution of coverture from preventing a wife from devising what is devisable provided the rights of the husband are not infringed - Real property is here devisable & as our Stat does not disqualify feme covert they stand upon the same footing respecting it as with respect to property devisable at C.L - qu - Omitted in the Lecture -- EG.

But even here tho the St - is no general she cannot deprive husband of courtesy when he is entitled to it - Devising is merely substituting another heir at law & husband's right is paramount to that - express provision in the St therefore unnecessary - The decision by the court of Errors was approved by the Legislature on petition for new trial - Denied con - 2 Day 163 -

But if husband is banished for life wife may make a will (or devise I suppose) for she is as a feme sole & may in all things act as such Pow 148. q.

Devises

2 Vern. 104. 2 Ba 149. And in Eng. there are ways in which a feme covert may retain or preserve the same power over her estate real as well as personal as is proper by feme sole - that is - the power of alienating or devising Pow. 149

This may be done by either of two ways which two modes do not interfere with qu. of disability - 1 By way of trust - 2 By way of power over a use Pow 150 2 B.B. 693 Such settlement may be made before or after marriage - If after however it must be by fine or recovery Pow 149 - And it seems that now a bare agreement for either of these purposes will be suff. tho the settlement is not actually made 2 Ba 695 - 6 Bro. Ch 156 Pow 166 2 Ves 191 -) that is - the heir will be compelled in Eq. to make a conveyance in pursuance of her appoint - Eq. considers as done &c -

1. By way of trust - As if a ~~conveyance~~ woman having real estate convey it before marriage or by fine or recovery afterwards to trustees in trust for herself for her separate use during coverture & afterwards in trust for such persons as she shall afterwards by any writing &c appoint - A devise by her will be a good declaration of the trust & supported in Eq. - Not called a devise but a writing in nature of a devise Pow 162 2 Ves 612 -

2. By way of power over a use - As if a woman convey real estate (ut supra) to the use of herself for life rem. to the use of such persons as she shall by any writing &c appoint - A devise making

the appointment supported in Ch. Pow 150 2 B. 695 2 Ves 612 614. 3 Br. Ch 308 4 Vin 168 3 Ath 707 2 Eq. Ca 457. 3 B. Pow on Powers 50 – So now supported in wills of Lan 2 B. 695 Pow. 162 – that is – devises under a power of uses – not so I suppose in case of trusts. supra – Uses are now legal estates –

Every power thus exec^d takes effect as if the limitation in the instr^t of appointm^t had been contained in the original conveyance or deed creating the power – – The disposition is considered as taking place when the power is executed tho the nomination of appointee does not take place till the ex^n of the power – The deed of settlement is considered as the deed of disposition. Pow 163 – 68 Co. L 1112 – The appointment by devise in these cases must be exec^d according to the Statute of Wills &c – Pow – 149. 58. 150 – But if a feme covert is an infant she cannot thus execute a power over her estate – disposition wanted (Pow 168 – 3 Ath – 807. 2 Ves 298 –) So of infants generally – Pow on P^r – 43.). 3 Bro – 138 n 1 Ves 298 304 Co L 52 – 3 Ath – 695 – 710 – 711 Restraint duress & menace of imprisonm^t are disqualifications – these are such at C.L. Not expressly pointed out in St. 34 H. 8 – the implied from the words "at his free will & pleasure" Pow – 170 Cy – 143 – Ray 334 Sty – 427 –

Same rule doubtless in Eq^y for freedom of will which is essential in the making of every contract is wanting – 131 136 – 5 Co 119 Pow. C 163 –

So holden – that if a sick man is induced

by excessive importunity to make a will that he may obtain quiet - it is by restraint Pow 170 Hy 427 1 Ch. R 66 - but it must be in case of sickness - qu. Com D. Devise 461 - But there must be actual proof of undue importunity or restraint - Pow 170. 1 Rep. Ch 125

If either of the above disabilities exist at the inception of the devise (that is - its exn & publication) it will be void tho the disability be removed before its consummation by testator's death - for the consummation is founded on the inception which is void. Ex Coventon &c - Pow 172 Cy 113. Shep. Touch 216 - 11 Mod 157 Ray 841 1 Sid - 162 Comb 84. Plowd 313 Sand 236 - - A joint tenant cannot devise in Eng - This is the rule as to devises by custom before St. 34 H 8 - for the survivor claims the whole by a title paramount - He claims by death of his compan - the devisee after the death - right of survivorship commences with the inception of estate - devisee's right to it commences after - - Per & post - (Pow 174 - Litt. p. 281 Co L 185 Perk. p 500 -) and there cannot be a joint devise (Coup 269 -) in any case.

Same rule under St. 34 H 8 - Not expressly disqualified by these Stats. but tacitly by 34 H 8 which expressly empowers persons seised in severalty copercenary & in common - "Expressio unius est exclusio alterius" Pow 12 - 175 - 218 1 Eq. C 172 -

So if a joint tenant makes a devise of his part and survives his companion - & dies - it is not good - void ab initio - He had nothing then to devise - Pow 176 3 Ld 476 3 Burr 1488 Parsh 87. 3 Co 31. - Formerly doubted Pow - 176 1 Eq. C 172 - Perk. p. 500 -) If he survives his companion & then dies

Ind. note 512

devises it will legaed - In st. on joint tenant may devise no survivorship - words of st. general.

Gen. Rule - A man cannot devise which he has not or is not seised of at the inception of the devise - that is - the time of its exe. & publication - this rule is the E.L. rule as applicable to devises by custom (Paw 183 198. 2 Ba 51 Co L 111. Cro. E. 401. Sal 237. Holt 246 - 249.50) Ex. Relate. devise all his lands & afterwards purchases more - Sellers do not pass - (Devise is in nature of a conveyance in presenti to take effect in future (Paw 191. 3.) The owner must have a present interest - Some opinions contra but not law Paw 185 - Livery dispensed with from necessity - Paw 195

(Seems as to an after purchased lease for years - this is only a chattel Paw 189. 1 Ro 575 - Sr 169. Sal 237. - For a will of personalty is not considered at C.L. as a gift of a specific thing but as the appointment of an heir (Paw 187.) to his personal estate - after civil law -)

So in devises by custom it is necessary that devisor should die seised - for the conveyance is not consummated till testator's death - therefore if the owner of land after devising it is dispeised & continues so till his death the devise is void (Paw 184. 566 - 611 Holt 748 - 1 Roll 610 -) Seems of a disseisin by fraud or covin - good in Ch. Pa. 611 1 Roll 378. 1 Eq. L 171 -

Same rules obtain under St. - 11.8 Paw 183. 99. 201 2 Ba 52 - 1 Mod 217. Holt 251 Howd - 341 -

Devises

But if the owner being dispeised after the devise re-enter & dies seised the devise is good - for he is considered as having been seised continually (2 Ba 52 - Sat 238 - Pow 185 - Cll 11 Co 51 Holt 748 Palm. 205 -) So if the owner is dispeised at the time of making the devise but afterwards enters & continues seised till his death the devise is good for he is supposed to have been seised ab initio - He is seised by relation - action for mesne profits - Pow 185 2 Ba 52 Sat 238

It has been much doubted whether a devise of lands not owned at the time by devisor but specifically described & afterwards purchased is good - - correctly decided not to be - contrary opinions - within the same reason as if not so described. Pow 200.2 Rand 344. Holt 251. 2 Ld Ray 438 - Sat 237. 3 Burr 1488 7 JR 406. 4 Mn. Ang

Upon the same principle a devise by mortg. of the lands mortged will not prop the eq. of redemption afterwards purchased by him Pow 202 3 Ch. R 99 -

In Ok seisin by dev. is not necessary ownership is suff. - "Having" or "seised" not used in our Statute Ownership suff. - So in devises by our law (3 Ray 166) right of prop. equivalent here for most purposes to actual prop.

Cases in Eng. a person having an equitable estate in lands (that is - a claim to them in eq.) may in Eq. devise the lands than due

Ex. Expectt. agreed by Ex. to sell lands to B. Before conveyance B devises them & dies - good in Eqy. - Commons on done &c - Pow. 202-207 2 Ch. C. 1111 Gilbert 78 P. Ch. 320 2 Ver 79 2 P.W. 635 1 Ver. 437. 7 94 - Vendor is a trustee in Eqy. for vendee & on a bill by the latter the court would decree a specific performance Pow. 208 - This is not treated as a devise of a future estate - the land belongs to vendee from the time of agreement in Eqy. - But the land will not pass by a devise executed before the exec. agreement is made - No present interest in Eqy. Pow. 212 - 2 Pl. 629. Jones (Pl. by Ch. Chan.) if the devise was for payment of debts - Pow. 215 - 2 Ch. C. 1111. Sed qu. difficult to see how it can be done in Law or Equity -

Subject matter of Devises

"All lands" (not devisable by custom) are devisable under this Stat. Pow. 220 "All lands" here denote the subject-matter not the tenant's estate - Pow. 229. All estates are not devisable - but all lands are - if the tenant has a devisable interest in them - "Tenements & hereditaments" not valuable are not devisable under these Sts. as personal franchises ways &c - Pow. 41. 227 226. 1115 - 3 Co. 22 - 10 Co. 81 Co. C. 359. Ways not devisable here Inclosure - no estate - easement only - "Lands, tenements & other estate"

Commons devisable being valuable Pow. 220 - Co. C. 369 1 Atk. 619. Rent rents are devisable under St. 11. 8 if the owner has a devisable interest in them Pow. 226 - Litt. p. 585 Co. C. 505 3 Co. 33.

An annuity in fee is also devisable (an annuity for

Devises

year was 11 of C.L.) different from a rent in this that it is a yearly rent charge on the person of the grantee Pow. 229. Co L 144.

Interest of Devisee

In Eng no other than a fee simple estate is devisable under St. H.8 – The words "Estates of inheritance" in 32 H.8 being enlarged by 34 H.8 to include estates in fee simple only Pow 2nd 229

The words of our Stat. general – "lands & other estates" include also estates per autre vie – Ante

Chattel interests are devisable at C.L. – Pow 6, 2 Bl 344 2 Inst 7 – as terms for years

There are several estates of inheritance in lands called estates in fee simple – 1 Fee simple – absolute – 2 Determinable – 3 Base or – 4 Conditional – Pow 230 7. Plowd 557. 2 Bl 109 –

Of these

Stat. de donis fees conditional are confined to persons heirs of the body in ancestry descendible Pow 232 – 7 – 9. 1 Co Ch 326 –

All these are devisable by Stat. H.8 – "Fee simple" used in its most general sense & as distinguished from estates tail & per autre vie Pow 232 – 2 Bulst 184.

As estates in fee simple may be in possession or not in posse – as to the former there has been no uniformity of opinion – always holden devisable Pow 232. 4 – 5 –

The word estate in a devise carries a fee - because it refers to the interest ~~matter~~ 1 Bal 236 6 Mod 106 11 Johns 365 13 do 587 2 TR 658 and also 1 TR 411 4 do 89 7 East 359 6 Johns 191 4 Day 368 1 Ball 226 3 Chan. 97 4 Dallas 175 7 do 35. 4 Maulan 366. 38

So a devise of all testator's right in certain land 2 C.R 345 6 Binney 97 or of all his interest 2 Johns 391 12 do 689 15 East 225 6 Binn. 94 15 East 505. 16 East 221

So of all his worldly effects - Cowp 299 15 East 223

So of land to one to dispose of at his pleasure 2 Johns 391 6 Binn 97 - 1 Bal 236

"All & singular my lands & tenements to be freely enjoy^d & poss^d" passes an estate for life only 10 Wheat 204

Rule If there be no words of limitation to accompany the devise takes an estate for life only unless from the words of the will there appears a plain intention to give a larger estate 10 Wheat 204

"My Mansion in A. for which I paid $600" a life estate only 23 C. L 122 – "All my estate" carries a fee if testator had one 2 Ves 48 – but "all my freehold estate" if descriptive merely of a particular estate or "all my lands" carry only a life estate 23 C L 123. – Ried 11 East 221 "all my freehold property" holden to carry a fee specially not merely as descriptive Nichols v Butcher 18 Ves 193

Fee simple not in posse may be divided into 1 reversions - 2. vested remainder - 3 contingent remainder - executory devises &c. 4 Estates subject to a condition of re-entry Pow 232 - Rand - 134

Where interests are all devisable except the last. Pow 233. 3 Bulst. 184 tho formerly holden that the third class was not - Pow 34 - 600 2 Bl 222 1 Hl 33 - Co. C 281. 93. 387. 404 - As to devise of reversions see Pow - 234 - 10 Co 98 2 Ver 621 2 Vent 285 A reversion expectant on an estate tail is devisable under these St. - H. 8 - Pow 235 - 10 Co 81. Hob - 333 -

So a remainder expectant on an estate tail is devisable. Pow 235 - 1 Roll 609 Co L 111 Indeed this is a vested remr. 2 Lord 181. 2. 4. 92 - Hob 30 Sed 232 - 3 Ph 488 - In Ct. there can be neither rem. or rever. expectant on an estate tail - St. Ct. 21, 23 -

Estates in fee simple may be legal or equitable - Both are devisable under St. - H. 8 Law - Ex. Law Equity of reconciliation. Pow 221. 169. 2 Burr 978 - So if an estate is granted to A. in trust for B & his heirs B. may devise it. Pow 235 - 1 Com. 257. & the was before St. 27 H. 8.

What estates may be created by devise

Devise in fee simple absolute, may devise an absolute fee simple - so of course any other fee simple which can be excluded by the act of the party Pow 237 3 Com. 216 -

Devises

To one having an absolute fee simple in rep.ty rev.ty or rem.ty may by devise create a fee tail Pow 238. 1 Rell. Abr. 836 pl 11
But a devise of a fee upon or after a fee is not good. Ex. to A in fee & if he die without heir to B in fee Pow. 238. 1 Co 97. Co. Ent. 57. Sid 291 This rule however relates to devises considered as dispositions in presenti - not to executory dev.s - By them the rule is now evaded. Pow 250. 238 marg. But the case stated by way of example would be void by way of exec.y devise - Contingency too remote - As to remainder created by way of devise & exec.y devises see "Estates in hop.s" Pow 248. 70

No tenant in fee may devise to one for his life or per autre vie - dev.ee may enter in these cases immediately on dev.rs death Pow 240. The rev.ty in these cases descends to the heir of dev.r Pow 241 -

No tenant in fee after having devised for life or in tail may devise other estates out of the estate remaining in him & that is the rev.ty till his whole fee is exhausted - The latter take effect upon the expiration of the former - Ex - to A for life - then to B in tail - then to C in fee - Pow 241, Plowd 35. 1 Sid 285 - 2 Keb. 29. 55-84 1 Lev 144

And a limitation of the ulterior estate remaining in dev.r (ut supra) may be either by way of rem.ty or by devise of the rev.ty Pow 242

No a term for years in lands may be created by devise (Pow 243. 1 Co 76)

& de novo - Could a term for years be created out of lands de novo at C.L.? Pow 6.248 2 Bl 374 -

Estates created by devise may be absolute or conditional - Ex to A for life generally - or to A for life he paying a certain "rent" to the heir Pow 245 - Dy. 126. 348 - & these conditions may be either precedent or subsequent Pow 246 see "Ex. on Cond^ns"

There are no technical words to distinguish these two species of conditions - Every condition is to be construed precedent or subsequent according to the apparent intent of the dev^or Pow 246 Salk. 164 - But a condition describing the qualification of the dev^ee to take is in its nature precedent - Ex to A - provided she marry with consent of testator's Ex^rs - marriage with their consent is a condition precedent Pow 247. 2 Vern. 573. 340

But a devise to A & his heirs upon cond^n that within three months after testator's death he execute a release of all demands to B - subsequent - Devise of a present interest Pow 248 1 Ves 1120 Salk 165 the defeasable.

Estates created by devise may be either legal or equitable - A devise of lands (that is - where devisor has the legal estate) or of a use since the St. Uses 27 H.8 is a devise of a legal estate Pow 270 - For the St. executes the use - transfers the legal estate to it. 2 Bl. 335 - Pow 8 236 248

1. But a devise of a use before the St. Uses was of an equitable estate only - be at

Devises

this way is a devise of a trust in Eq.ty Pow 271 (Property said to be holden in trust when the legal estate is vested in one in trust for another Pow 283 — Uses were devisable at C.L before the St. Uses Pow 271

If land is devised to one no use being limited upon it it cannot be averred to be for to the use of any other than the devisee — for this would be contrary to the intent upon the face of the instrument Pow 271 11 Co 11 — Seme in case of a deed But if a use is limited it will enure to cestuy que use — & will be exec.d by St. Uses Pow 271 2 Vent 312 2 Co. 107. 1 Leon 253 Popl. 11 — 10 Hay. 875 —

If land is devised to A & his heirs to the use of A — for life only the use of the fee is in devisor heir Pow 272 — Popl. 11 —

2. So an Equitable estate may be devised that the meaning of a trust Pow 282 — Property is said to be holden in trust when the legal estate is vested in one & to remain in him in trust for another Pow 285 — 2 Bl 335 —

Indeed such uses as are not exec.d by the St. are called trusts. Pow 285 2 Bl 375 — 1 Eq. C. 583 5 Mod 63 — As to the origin of trusts see 2 Bl 335 — Pow 282. 9.

Difference between an use & a trust — the former covers the legal estate the latter does not — Pow 282 — For the distinctions between trusts exec.d & exp.y see Pow 280 1 Atk. 581

1. When the trustees

An estate will pass by mere implication without any express words to direct its course - 6 Johns 190 - Devise to heirs at law after death of devisor's wife - Wife takes an estate for life - 1 W 4 B 288 Plowd 521 Cro J 75 1 Vern 22 2 Ves 571. 723 - Semble if the devisee had been to a stranger after the death of the wife - the wife would take nothing cons. supra Cro E 16 -

So an estate for life in a chattel interest may arise by implication 3 Ves 493 Burr 2608 Co. Bl 1.92 9 East 305 -

Where there is a legacy for life or any limited period with a limitation over of specific articles which are not necessarily consumed in using the first taker was formerly required to give security for their forthcoming on the happening of the contemplated event & the remainder man must take them in the situation in which they were left by the ordinary & prudent use thereof 1 Eq. C 361 1 Rep 66 110 the modern practice is to require an inventory only without security unless there is danger of their being wasted or lost 1 Bro Ch. C. 379 3 PW 336 But whether a gift for life or of articles which must necessarily be consumed in using shall be considered an absolute gift or whether they shall be sold & the interest of the money be taken by tenant for life is uncertain in Eng 3 Bos & Pul 314 3 Mer. 194

Where there is a gen. legacy of a residue for life remainder over including articles of both description & other property the whole must be converted into money by the executor & invested in permanent securities & the income paid over to the tenant for life 2 Paige 132 3 Mer 193 Preston Leg 96 Rep. 209 7 Ves. 137 and 2 Schoul & L 243

are directed in the instrument creating the trust to execute a conveyance of the legal estate it is exp^d.
2. Where no further conveyance is directed it is exp^d – But the exp^d trust does not induce the legal estate it is still an equitable interest – "equitable trust" Pow 286.7. 1 Atkins 581.) A decree for conveyance of the legal estate is as necessary in the one case as the other – & Nevertheless says however that all trusts are in their nature exp^d Pow 287. 1 Atkins 581. 2 Ves 328 –

One may devise not only a devisable interest but an authority over an interest – Ex Devise that J.S shall have the "disposing selling letting & ordering" of testators lands – – Such a devise however gives dev^ee a power only to manage the land as he pleases & to lease it at will not to sell or lease for years – for he has no interest Pow 289. Cy 36 – Cro E 678. 734. 74. 341 Yelv. 73 –

But if one devises – "that his lands shall be sold by ~~them~~ his E^tors" or "orders "that his ~~ow~~ shall lands shall be sold by them" or "appoints constitutes & empowers them to sell" they have authority to sell Pow 293 Mo 774 Co 113 – 1 Roll 330

Devise – "If my personal estate is insufficient I devise my land to A & B to sell for payment of debts" &c – "All the residue of my real estate to A" – personal is suff^t – A takes all the real immediately. Cowp 43 & Ray 1234 –

Devises

Authorities devised are bare or are of two kinds - 1. Naked 2. Coupled with an interest - Pow 292 Cauf - 263 n3. Powers are unknown at C. L. before Statutes 27 H 8 - recognized in Ch. only - modifications of uses Cauf 262.6 -

Naked authorities

This is a bare power to sell &c - no interest devised as in the last examples (ut supra) Pow. 292. 302 - Co L 113 - 1 Roll 330. Co L - 282 - Mo - 774 - see Co L 113 n3 - 236. 181 n3 - Cow 400. 8 East 538

In these cases the freehold descends to the heir till the sale. Pow 292 - Co L 113 1 Inst 236. 05 - 3 East 553 3 Day 388 -

and a release of such authority by the person empowered is void - Ex. Ex. empowered to sell release to the heir - the release vapes no interest for Ex. bar none. Pow 293. Co L 406

such authority must be strictly pursued & the ex. of the power must therefore be construed with reference to the power itself - Pow 294 2 R 241 2 East 376 1 Sum 120 Cauf 263 2 Ves 644 1 Wils - 170

14 John R 553 - So the authority is strictly pursued - not transferable - founded upon personal confidence - If there are two & one dies the other cannot execute it - extended to two - So the both are Ex. for they take not as Ex. but as trustees (Pow 294 Jenk. 214 - 1 Cond 145 Dy - 17. sed 1 Root 6.) of course the power does not survive to the Ex. of the original Ex. 3 Day 388 -

Devises

So if the devise is that his lands shall be sold by his Exrs. or the Exr. of his Exrs. & surviving Exr. appoints Exrs. & dies they cannot sell - for they are not Exrs. to both the original Exrs. Paw 295 Mo. 61 -

But a sale satisfying the words of the devise will be good in this respect - Ex. One appoints 3 Exrs. & devises his lands to be sold by his Exrs. - If one dies a sale by the other two is good Paw. 296 - 1 And. 146 - Co 826 - Dy. 176 - 219. Co 2 113 - Mo. 341. Co 2 524 -

If testator devise that his lands shall be sold without mentioning the person by whom - his Exrs. are the proper persons to sell (Paw 298. 307. 2 Leon. 220 Dy. 371. 1 Sev 30 - 1 Atk. 420 - 1 Ba. 200 -) if they are to distribute or administer the assets as to pay debts &c B 2 627. 628

(But if the Exr. has no concern with the assets of the sale the heir is the person to sell - that is - if the money is not assets in the hands of the Exr. Paw 299. 307 1 Atk. 420 1 Sev. 304 -) 2 628

B. And in this case the surviving Exrs. may sell alone - for they take as Exrs. virtute officii - Upon the same principle it seems that Exr. of Exrs. might sell Paw 298. 307. 2 Leon 220 Dy 371 -

If the person thus empowered to sell refuses to do it those for whose benefit the sale was intended may in Ch. compel him to sell Paw. 300 qu. - If the person appointed should

Devises

die Ch. wd. supply a trustee Semb. Pau 203-

Authorities coupled with an interest

A devise of land (or an estate) to Exs. or to S.S. to sell is a devise of an authority coupled with an interest. Pau 301. 1 Inst 236-65- see Co 2 113. 236. 181 no

So if one devises the profits of land to A till his son is 21. to educate him- the authority of A- is coupled with an interest. Pau 301. 2 Leon. 231. 3 Co 78 Dy 210.

In these cases the devee (not the heir) shall have the estate till the expiration of time limited & if devee should die his repr. will hold it during the time limited (Pau 202 Co 8. 252- Co 2 112-181 Hob 285- Hutt 36- 2 Leon 221. 3 Co 78 1 Bac 200-) for it is his estate during the term- ted inde Brants vs Chittenden 2 Day, contra 250

So the estate of devee will will continue till the expiration &c- tho the devise object of the devise should be sooner answered. Ex. If the son should die- (Surpass) before 21 Pau 202- 1 Ch. 2 98 (Dy- 210- The rule is otherwise as to naked authorities.

Under a limitation of an estate to "such child or children of A as B shall appoint" an exclusive appointment to one of A's children is a good exn. of the power. 1 P.R. 132 2 Ves 513- 1 P.W. 149 1 Coth 389.

A power to appoint by devise is not exd.

If a power to sell lands be coupled with an interest in the exr. if one die the other may execute such power 1 Cains R. 15 3 Dal 277 3 Atk 714 2 P.W. 102 14 Johns. R 553.

Where the terms used in creating the power detached from the other parts of the will confer a mere naked power to sell yet if it is coupled with other duties which require the exn of such power the power is one coupled with an interest & survives Com Jones R 252 Cro C 282 Bac A 297 307 Hard. 419 Cro C 382 Cro E 26. Sug. on P. 141 14 Johns R 554 3 Binn. 69.

A decree to apprentices or minors sents the estate in them & it is not necessary for them to take letters testamentary to perfect such estate – 5 March 226 –

by a mere residuary devise – If A having a legal estate in trust with a power to devise to either of his sons devises all his estate to his sons B – after payment of his debts &c – Trust estate does not pass – (8 Ves. 118 2 H.Bl 136 1 Atk. 558 2 Bro.C 297) No such intent (8 Ves 122) intent of passing it appears – An appointment by will is no exn of a power to appoint by deed Camp 260

Who may take by devise

In gen.l all persons not incapacitated by positive law may be devisees.

Under St. 32 H.8 as explained by 34 H.8 devises in mortmain are not allowed – i.e. – devises to corporations or bodies politic – St 43 Eliz – authorises devises to corporations for charitable uses – But this exception is much narrowed by St 9 Geo 2 – Pow 314 131 497 – Hob. 136 131 268 –

In St. corporations not incapacitated to take by devise – Here then all corporations wh. can purchase & hold lands may be devisees – R.S. –

Devisees then may be natural or civil persons except in Eng.d as far as the latter are disqualified by the above Sts – Pow 315 –.

Natural persons

Here may be either in esse or not in esse Pow 315 – Those in esse may be dev.ees unless prevented by some civil disqualification Pow – 315 – Some may take by devise who cannot devise –

Devises

Courtesy is no disability – Husb.d indeed may at law defeat the devise by disagreeing to it but Ch.y will interpose to prevent him from injuring the wife – Pow 215 – Perk. § 143.

So wife may be devisee to husband tho she cannot be grantee – for devise does not take effect till his death (Pow 215 – 1 Eq C 178 – Co L 112 – 1 Roll 610 Roll 241) at which time the legal union of the parties ceases –

An alien may take as devee, but he can hold only till office found – the estate then vests in the King – here in the State – I suppose Pow 216. 18 2 Ves 360 – 11 Seam 84 – 9 Co 1 1 = 3 Bl 258.9 as to office found

An illegitimate child cannot be a devisee till he has acquired a name by reputation – but he may then take by that name. A Devise to the son of A. is not good he being a bastard till he has acquired the reputation of being A's son – A legitimate child inherits a name – A devise to A.B – he having acquired that name is good tho he is a bastard Pow 319.36. Co L 3 n, Dy 313 – Nay 35 – Perk. § 26 – Sanch. 239. 2 Sid 119. 1 Atk 410. Mo 10. 6 Co 65 – 2 Roll 113

But if a devise is made to the "children of A" his legitimate will exclude his illegitimate children tho they are reputed his children – The former only are his children in law & the word are satisfied if they take all –

Pow 324 Mo 10 Nig 35 Suppose such a devise by a mother of the heir and – no difference – Semb. Pow 345 Mo 10 Co L 123 Dy 345 So by another to "her children"

2. Is to natural persons not in esse – as children in ventre sa mere at devisor's death

Distinction formerly taken between a present devise to an infant in ventre & a devise by way of remr. – the latter was holden good if the infant was born when the particular estate determd. – Seems not. Pow 320 2 Bulst. 275 Mo 637. Sect. 228

(But now by Stt – 10 & 11 W.3. if an estate is limited to one with a contingent remr. to his unborn child a posthumous child shall take as if born in fathers life time 2 Bl 169. 3 Ba 124 – 4th 212 – sed. qu – whether this St extends to devises (Semb. not) Sculth 228 – the words are "marriage or other settlement" &c

So a distinction has been taken between a devise to a person not in esse per verba de presenti & per verba de futuro – In the latter case it is well settled that the person will take – Ep. "To an unborn child when it should be born" Pow 322 1 Eq C 173 n 2 Bulst 275 – 1 Sid 153 – 1 Sw 135 – Sect. 229. Stra – 1093 – 3 Ba 124 Fearne 129 5 M. 501 (No such distinction now Semb.) The latter is good by way of Exty devise 3 Ba 124 & the freehold descends to the heir in the mean time

Devises

Paw 326 - 1 Roll. 609. The last distinction does not contemplate remds but direct devises to infants in ventre &c -

So under a devise to such children as A shall leave living at his death a posthumous child will take. 5 B.R. 51 cag. Pl. 50 1 Pl. 216 2 Green 223 2 H.Bl 399 - 1 Bos 243 -

But whether a devise to an unborn inft. per verba de presenti is good (he being unborn at devr. death) is not settled in Eng - according to Paw 322.32 - opinions contradictory (Ay 303 - Mo 63). 2 Bulst - 273 Sal 230 Ray 83. 1 Mo 177. 1 Leo - 135.56 1 Green 244 2 Atk - 8.9 1 Wils. 105 - Keane 128 Cf. "I devise to the eldest son of A" &c - The weight of opinions is in favor of the devise - Paw 330 2 Bos 124 (Doug 476 cag 4 Burr 2157. 1 M.R 643 2 Wils - 225) The devise is certainly good Semb -

The objection to the infant's taking in such case is that as he has no capacity to take when the devise takes effect the freehold must be in abeyance till he is born if he takes at all Paw 324 3 Bos 124 - But why does not the objection (if it amounts to anything) hold in the case of an eqty devise to such infant - which is clearly good. The freehold descends to the heir in both cases till the infant is born & therefore no abeyance for one moment 1 Roll 609. Heir not accountable for intermediate profits 5 B.R 57. 3 Wils - 526 Cod 11. Keane

These words of gift are necessary to disinherit the heir if it is not given to any other person he is not excluded but will take as heir the agt. claiming intestate Jones 79. 2 Saunders 51. 2 Vern. 225. 3 do 493.

Where testator had 2 sons & a daughter devised B. one to one of his sons in fee & devised that in case of his intermarriage & death without leaving lawful issue the estate so devised shd go to the daughter. The son died in the lifetime of the daughter without issue & without having been married held that the limitation to the daughter did not take effect — on the ground that the contingency depended on the marriage & as that never took place the contingency could not happen

An unborn child after conception is in esse for every purpose which is for its benefit if it shd be born alive but as it prejudices the rights of others if it is born dead or in such early state of pregnancy as to be incapable of living it is considered as having never been born or conceived. 2 Paige 35

Where testator devised real estate to his wife for life remainder to his 6 sons in fee & personal estate to his daughter & then directed that if any of his sons or daughter ~~that then his~~ should die without issue the survivors should have what so ever thus given to the one so dying - Held that the limitation over to the survivors was good as an executory devise & took effect on the death of one of the sons without issue living the mother 8 Paige 281 2 Bowen 389 "dying without issue" means issue living at the time of his death & not to the event of an indefinite failure of issue 16 Johns 382 20 do 483

When the first limitation over in a devise is executory all the subsequent limitations will be executory until the first limitation acts in fee - then the subsequent ones are in their nature contingent remainders - but where the first

limitation over rests in posse the delay over will be changing from executory devise to remainder provided they can take effect as remainder 3 Paige 281 2 Saund 388 i n g

If the first limn over is not of such an estate as will support the 2d as a remainder & first 2d limn over can only be ~~supported~~ valid as an executory devise the nature of the 2d limn will not be altered by the vesting of the first in posse before the happening of the contingency on which the 2d depends 3 Paige 281

When a limn over can be supported as a contingent remainder it will never be construed an executory devise 3 Paige 281

At any rate if there are express words used or facts adducted to in the clause affording an inference that testator was aware of dev.ee's incapacity to take immediately he shall take as by a future devise Eg. "To the unborn child of A when he shall be born" &c. "If such child shall be born I devise to him or her" &c. Pau. 332 1 Ves. 135 – 1 Eq. C 173 2 Vesch. 300 Pd. 752. Sel 229 Hall. 1115 –

And accordg to the more modern & better opinions every devise to an unborn child does afford this presumption – Because it implies a disposition to take effect at its birth (i.e. an exty or future disposition 4 Burr 2171.) Pau 326. 36. Sel 230 Fearne 428 1 Vern 105 2 Mod 8.9. 13 Ves 186.) As to devise to an infty in ventrede with a condl limitn over & no child born the limitn takes effect – see Cowp 40 Cond 437. 2 Eq. C 200 7 Ves 186 –

Civil persons may be devisees – as exr & admrs. – Eg Devise to the Exr of J.S. is good Pau. 336 So civil persons not in esse if the intent is clear – as to the Exrs of J.S's Exr Pau – 336 –

But punishments are not such civil persons as can take in that character Pau 336 – qu. Why?

Every devisee must be properly designated or he cannot take – The designation may be either by naming or describing him – & tho his name is mistaken still

if he is suff.ly designated by description he may take 1 Mac. 293 - Co L 3a 11 Co 21a 1 Ath 110 Pow 1198 1107 3110 337. 6 R. 671.

Not if the name applies to any other one - but this position requires to be taken with qualifications - parol evidence may under certain restrictions be admitted to explain the ambiguity - of wh. post - 5/33 &c - Ex. To the governor of the State &c - Hob. 32 - Co L 3a So "the son of such a one" is suff.t Pow 340. 1 R 837. Hardw. 91 -

And the description the not strictly & legally applicable may be made good by reputation. Ex. To A the son of J. S. - A being a bastard Pow 338 1 Ath 110.

But this rule does not hold in favor of a bastard born after a devise made for he must be capable of taking if at all at the time of his birth - but he cannot gain the reputation of being a child to any one except by "continuance of time" (Pow 338 Co L 509. 10 6 Co. 65 - Co L 123. 1 P. Co 529 Roper 9. 10) Besides a birth of such a child is potentia remotissima.

Hence also a devise to all the natural children of A - will not enure to the benefit of one in ventre &c Pow 339. Co L 530. Roper 10 So also a woman may take as devee under the description of the wife of A - if she be reputed to be his wife tho she is not his bawdy wife Pow 340. 8 Co 93 -

So a devise may be constituted by an equivocal or inaccurate designation. Ex. Under a devise seriatim pro of devise – a daughter may take if such appears to have been the intention – the prima facie the words designate a son – Pam 340. 496 Ch 4-337. Mo 105 – Mod 32 – And a son would take under this description to the exclusion of an elder daughter –

So a daughter may take under the description propinquissimus of the devisor tho the adjective is masculine – as if there is no son. So the elder daughter in this case excludes the younger. Pam 342 Co 8 10 Palm 11. 303. 1 Eq Ca 212 See 13 R. 1002 –

The word child or children is a sufficient description – Ex. To A – for life & afterwards to his children – his children take a life estate in remr. Pam 344 Mo 280 6 Co 17. descriptio personarum – The word "children" is generally used as description personarum or a word of description – in which case the persons described take as purchasers – Ex. last case – So if an estate is devised to B and his children (he then having children), he & they take the estate as joint purchasers Pam 344 6 Co 17. Cro. E 713.

But if A in the last case had at the time of the devise no children children is a word of limitation – that is – the children take as heirs – they cannot take immediate as purchasers because there are

Devises

no words of rem.n - and they cannot take a present estate as purchasers - not in esse - therefore he takes an estate tail Pow 505 6 Co 17. Doug. 309. 1 H.Bl 456.60 1 Bulst. 219 1 Vent 227 231. 4 T.R. 294

The description of a devisee may be either general or special Pow 345 - By a gen.l description is meant a designation of any person who may happen to answer the description -

1. General - as if one devises to J.S. in tail rem.n to the next heir male of dev.r - He who happens to be next heir male is constituted devisee Pow 346. So devisees may be constituted by a devise to such a "stock" - "family" or "house" & it will enure to the "heir principal" of such house &c - Pow 346 Hob. 33. Co. 333.

If a devise is made to the "posterity" of A. his lineal heir if he has any shall take if not his collateral heir of the whole blood - Pow 347. 2 Eq. C 290 If a devise is made to the "next of the name" of the testator the next relation of his name" whether male or female will take Pow 347 Co C 532 Hob 32 - So a dev.e may be described by the words "next of kin" to test.r in wh. case the person answering that description by the rules of computing kindred will take Pow. 347. Co C 5 16 3 East. 278.

And if a particular estate to another is interposed still the words "next of kin" are construed to include those & those only who answer the description at the time of testa.rs death 4 Br. Ch. 207. 3 Ves 10. 234 - 3 East 278. 294

So the words "the nearest relation of my name" is good description – But in this case relation is nomen collectivum & includes all testr. nearest relations in the degree mentioned – Ex. All his brothers & sisters in marriage if he has no nearer relations Pow 3 197. 347. Ves 335 –

If testator explains whom he means by "nearest relations" persons not falling within that description may take Ex. "To my nearest relations the Ds & Ns – Here the latter tho not so near in kindred as the former shall take (Pow 350. 1 Bro C. 32 – see Pow 3 73. 405 –) Particular takes place of the genl. description

If one devises to "his nearest relations according to the St. distributions" his wife takes no part – for tho she would be entitled to a part under the Stat. she is not his relation – that is – related by consanguinity Pow 350. 1 Ves 84. 3 Atk 59. 61

If one ut supra bequeathes personal thus "to my nearest relations" – those relations who would take under the St. of distributions are the legatees – So I suppose if the words were "my relations" Pow 351. 2 197 2 Eq. C. 332 – 68. Bell – 237. 1 Ves 84.

But if devse of land were thus described qu whether the above rule wd. hold – or whether the devise wd. be void for uncertainty Pow 352 see 3 East 278 –

In Et. I presume the St. wd. ascertain the devees in the last case – for our St. regulates the

succession as well to the real as to the personal estate of intestates 8 A Ct 168

If one dev. lands to the "next" of his name" it is a question whether a daughter who by marriage has changed her name can take – According to some this is the distinction – if she is unmarried both at the time of the devise & of testar. death she may take tho married at the time the question arises Pow. 352 – Bro. C. 576 – 532 – Seem if she is married either at the time of the devise or of testar. death –

But Sd Hearwicke seems to be of opinion that if the dev. is immediate or by way of vested rem. – suffi. if she is unmarried at the time of the dev. – If limited upon a contingency that her name at the time the contingency happens decides her right – Pow 353. 1 Ves 338 – This rule I think is correct – it is the latest & the point must be decided by authority – altogether arbitrary

It is a gen. rule of construction founded on feudal principles that if an estate of freehold is devised to one with an immediate or intermediate rem. to "his heirs" – "the heirs of his body" – or "his issue" he takes an inheritance in the first case a fee simple – or the two latter an estate tail Pow 355 n 2 Bl 242 – 2 Pow. C 41 1 Cogg Ld Ray 873. 2 Wil. 323 1 Burr. 38. 4 B.R 82. 294: 5 299. 320. 6 30. 7 533. 8 16. Mad Cases Deane 25 – 4 Burr 2519. Pow 323. 3 Ves 437 Hia 1125 2 Atk. 214 The rule forms a sort of distinct code in construction of devises –

When the rem. is after an intermediate limitation

the devee takes an estate for life & the inheritance in remr - former not merged (Doug 323.30. 2 Atk 214.50) The heirs do not take as remrmen or purchasers - Gift to A for life remr to B. for life remr to heirs of A. The heirs are not purchasers -

But another & important reason for the rule is that the words "heirs" are construed in such cases as words of limitn - not of description - that is - to ascertain the quantity of interest given to the first devee for his benefit (Pow 179. 7 Pick 139.) and not to designate the persons who are to take after him - If they are words of description then the heir takes only an estate for life - Note - where no previous freehold is limited to the ancestor the word heir is as apt a word of description as any other -

But the reason of the rule has ceased with the abolition of feudal tenures - courts endeavor as far as possible to narrow the rule Pow 357. - The rule almost always defeats the intention - An heir may therefore at this day take as remr as a purchaser under the description of "heir" if the a previous freehold is limited by the same devise to his ancestor - if it appears from the devise that the word "heir" was intended as a descriptio personae - As to A for life remr to his heirs for life - Pow 358 Co 372 - Cro E 40 Co 17 Sal 224 - Lev R. 203 - 11 Burr - 2579. 1 Eq. C 184 - Eq To A for life only & to his eldest son male (Pow 359 - Cro E 40 - Co 17. A takes for life only - Sem if it had been limited to his eldest heir Pow 363 - 1 Atk 111 - yet Co 3 313

Devises

To to B for life & to his issue male & his heirs genera. Here B takes for life only & his issue male a remn. in fee Pow 359 Sel 224 Le R. 203 -

"Issue" in its most proper sense is descriptio personae - but it has generally been construed as a word of limitation except where the intention to use it in its proper sense has been manifest Pow 360 Stra 731 1 Co 103 Co 8 40 11 R. 294 -

If an estate is devised to "A for life & after to the next heir male of his body & to the heirs male of his body," - "heir" is a word of description - A takes for life only & his next heir male a remn. in tail male by purchase otherwise the word "next" & the superadded words are negatory, P363 1 Co 66. see Frame 256 -

2. A description of the devisee may be special - i.e. an actual description of the person - not a designation (as in the ab. one case) of any person who may happen to answer the description Pow - 365 - Let "To A the son of J.S." Here the description designates not merely a son but a particular son of J.S. - (Pow 357).

"To A the heir male of the body of A now living" - that is - to the present heir apparent of A - Pow 365 - 1 Eq. C 211 - 1 Vent 334 - 2 Vn 311 - Roy 330 3 R. C 32 - 2 Vern 660 - "To to the second son of A" - This is a special description of the second son in order of birth Pow - 365 2 Vern. 660

When the introductory clause to a devise of real estate shows an intent in testator to dispose of all his interest the subsequent words will if possible be so construed as to pass an estate in fee so as to prevent an intestacy of any part of the estate 8 Johns 191 3 Burr 1618 and Hendr. 142 Str 1020 1 Ch. Ca. 96 Cowp 352.

But gen. introductory words alone will not carry a fee 8 Johns 141 1 Price 353 1 N.R. 335 8 T.R. 64 6 do 610 5 do 13 Doug 759 - Cowp 657 -

" As touching such ~~estate~~ worldly property as I have I give & after sundry legacies concluded " & as to the rest of my worldly goods " lands debts & money & every thing else I die possessed of " I give to A." held that without the latter words A would not take an estate in fee in lands not devised specifically but with them he would 20 Ld 280 2 R 1444

John H. Rufell. 1148.

Gen.l rule – necessary that the devee. answer in all respects the description given him Pow 367 – (Not an universal rule.) Hence if devee is described as heir of such a person he must shew that he is heir in that sense in which the word is used by testator – Pow 367. Thus if one devise to the heir of B. generally – & B is attainted of felony – B's eldest son cannot take for B can have no heir – Pow 367. Senk. 203. Ibid – 193.

So if one devise to the "heir" of B generally & dis. living B – B's eldest son cannot take for "nemo est hæres viventis" Pow 367 2 Leon 70 Cro Eq 99. 1 Co 66 –

So if testr. describe any particular heir as the "heir male" or "female" of B – (without more) the person to take must answer the description in both particulars – she must be heir as well as female – – therefore if B has a son his daughter cannot take Pow. 370 82 Hob 34 2 Roll Ab 860 Co L 28. 29 2 Vesey 1 This rule has excited much disrepute but has always stood its ground – Lord – 558

But if the devise shews by positive words or necessary implication that a person not heir gen.l was intended to take by the description of a particular heir such person will take – e.g. To my heir who is my brother to B – Here to B will take tho not heir general. Pow 373 Hob. 34 1 Vent – 372 – 1 Ch. Ray – 185 – Pitch. 468. 467. 469 –

So if the intention

Who may take by Devise.

is clear (ut supra) one may take under the description of heir in the lifetime of the ancestor – Or if testator takes notice that the ancestor is living – Exp. – "To the heir male of the body of C. – legatee" – giving the other a legacy – "Heir" construed heir apparent Pow 376 1 P.W. 229. 1 Bro. C. 489. Bl. R 1010.

It is a general rule of construction in all questions arising upon devises that the intention of testator shall govern if consistent with the rules of law – that is – if the nature of the limitation is such as the law allows. Cong 327. Dy. 3.4 Polley. 480 This is the first & great rule in the exposition of devises. 2 Day Events v Chittenden

But there has been much doubt whether if an estate is given to one semb. to the "heir male" (or "heir female") of his body (the words being words of description) it would be necessary that the person to take (i.e. by purchase) should be heir as well as male or female – And the qu. is the same if an estate is limited immediately to the "heir male" &c of a stranger – Ex. – "To the heir female of the body of J.S." – Will his daughter take he having a son? Semb. she will Pow 181. 95. 2 Ch. 102. 61 5 Burr 2617. Co L 164 Vent 372 Prec 228 Co L 24. 1 Co 95. – Q. distinction between this case & the one ante 558 "Heir female" (without more) denotes heir genl. Pow 387 Co L 27. But "heir female" of one's body designates his female issue whether heir genl. or not Pow 388 Co L 19 1 Co. 35 –

a person in no sense answering the description of "heir" may take under words importing to constitute an heir - Ex "I devise that my wife shall be sole heir to all my real estate" - So of a mere stranger - Here the word heir does not designate the devee. but the interest which he is to take. Pow 395 - Hob 75 - Noy 48 Hob 311 Sti. 308 Mo - 864 - 1 Freem. 293. The devee. takes a fee Pow 398 Noy 48 -

But if one by devise makes a devee of his lands a will takes only his chattels real Pow 398 Noy 48 Pl. Ch. 471 3 Keb. 119 Sti. 301.

After all

It is a genl. rule that if the description is so far certain that the person intended may be distinguished from every other person the devise shall not fail for trifling omissions or inaccuracies Pow 344 403 - 419 for a devise is not to be construed void for uncertainty unless from necessity (Pow - 348 422 - 1 Ves 335 - 10 Co 5) Plowd 345 - 523 - Cro E 106 Hob 32 - (Ex "To Margaret the daughter of J S" - her name being Margery P 405.) 1 Freem 293. 1 Salk 3 - So "To the wife of J S" - If she has no husband J. S. & then testator dies - She shall take Pow 405 - 6 10 Mod 371 Plowd 344 - This is vested & not contingent & comes within L. Hardin - distinction - ante

So

where a sick man devised to his "posthumous child" then in ventre sa - & the child was born before his death - it was argued to take under that description -

Pow 106. P. 6. 175 – But if the description is false & not merely defective the devise is void – & to the heir of Ca – Ca being an alien Pow 107. 1 Sid 193 –

Sem if the person claiming under the devise is reputed the heir of Ca – Pow 108 2 Sid 151

How a devise may fail of taking effect

A devise may be ineffectual either from defects apparent upon the face of it or from something extrinsic – Pow 109. Of the first kind is any uncertainty or repugnancy in the words used or to the thing devised or the interest in it – or as to the general intent of the devisor – Such uncertainty is termed a patent ambiguity – Pow 109. So limitations contrary to the policy of the law fall under the defects apparent – Pow 109.

Extrinsic objections to the validity of devises are founded upon some uncertainty or repugnancy arising out of facts not appearing on the face of the instrument – As where a doubt arises to whom of several persons or to which of several things respectively answering the description used the words were intended to apply – Uncertainty or repugnancy of this kind is called a latent ambiguity – Pow 109. 10

1 Patent ambiguities

It is an universal rule of construction

Said 4 Wheat. 1. that an unincorporated association cannot take by a devise to them in the name of their society & that such devise cannot be enforced in Chancery as a charity under 2 Peters 566 3 Paige 300 – But if the devise provides for the vesting of the property in a corporation to be created it is good 3 Peters 114 1 Green. 271 9 Mass 44

If an estate is devised to one charged with a sum in gross to be raised or the devisee shall a fee passes 6 Johns 191 1 Ins. 9 3 Burr 1623 5 JR 561 8 do 503 2 Burr 1455 10 Johns 148 2 JR 343 4 East 496 1 Cooke 96 3 Maule & Sel 522 - Semble when the charge is on the estate devised - with survivor or where the payment of the charge precedes the estate or is an exception out of it no fee ~~passes~~ is implied 3 Maule & Sel 522 5 East 87

Feargus O'Conor.
New York. 1848.

A. What shall be said to pass by a devise qe messuage Ibidem 172
or dwelling house only or of a dwelling house with the
appurtenances is purely a questn. of intention to be
collected as in other cases out of the whole will. 3 Wils
141 Bl. Rep 26 1148 2 Sanns 401 n 2

that if there is a repugnancy which cannot be reconciled or an uncertainty wh. cannot be explained - the devise is void so far as the uncertainty & extends & the heir at law shall be preferred Powell - No parol evidence admitted -

Such uncertainty &c apparent on the face of the devise may be either as to the subject matter or thing devised - the quantity of interest meant to be devised - or the person described as devisee. Powell -

1. As to subject matter - Ex. "I devise a part of my land to JS"

A. Devise of a "messuage" or "house" with the appurtenances carries no other land than is necessary to the enjoyment of the house unless it appears that the words were intended to be used in a more genl. sense - (1 Bos - 53. 2 Co 32 Co. L. 5). Co. L. 16. 113. 7 Mod - 2 S.R. 198 - 1 P.W. 600) & in this case no parol evidence can be admitted to explain questions of construction - But in one case in N.Y. husband devised to his wife house & appurtenances which carried 10. acres

2. As to the quantity of interest - Ex. "I devise my freehold to my wife for 5 years & if any of my three sons die before the 5 years are out of the freehold then to be equally divided" &c - - What to be divided? The freehold or the term for 5 years? Powell 112 - 17. 1 Reb. 692 - 751 - 73 - Shinn - 266 - 2 Eq. C. 357). Parol evidence not admitted -

3. As to the person described – If the person described as devisee is absolutely uncertain the devise is void Ex. "To the last man in C" – Pow 118. 2 Lind. 12 3 Ent 172 –

So to one of the sons of C" he having several – So "To 2 of the poorest of my relations" (Pow 118 2 Vern. 624 Ray 82. 1 Roll 609. 1 Bulst 61 Cro. J. 260 – Poller – p 180 –) So to my wife for life rem.n to the heir male of any of my sons" Pow 120 Sti – 240 –) No parol evidence is admitted in these cases

But a devise is never construed void for uncertainty but from necessity – to be explained if possible Pow 122 – 318 Ves 335 – 10 Co 57. L.d Ray 1312 – 10 Mod – 103 – Hob. 32 – Cro E 106 – Ante

Latent ambiguities

If from extrinsic facts the person of the devisee is rendered absolutely uncertain the devise is void – Ex "To my son" – There being several – So "To J. S. of C" there being two of that name there Pow 124 5 Co 68

So if from extrinsic circumstances it is absolutely uncertain what land is meant – Ex "My manor of R" – he having two of that name Pow 125 – 8 Ves. 574

But if the devise were of "one" of my manors of R" – the devisee might elect. Bow. mag. 100 Pow 125 – Non par land proof is admissible to explain

ambiguities - see post 572 Pow 1185 - 2. Atk 371 (S.R.O.)

A devise may fail of effect for divers other causes Ex. A devise may fail of effect because testator's intent is contrary to the rules of law - (Intrinsic defect - Pow 309) Ex. "To A in fee if he die without heirs to B" Pow 1126 1 Burl 93. ante qu. as to the example 3 S.P.O. 1155 Pow 1131 Sal 234 -

So if in the draught of the instrument testators instructions are not followed - Ex. Testator directed a devise of land to A for life - but the word contained a fee - Void in toto - not good for life for there was no devise for life - Pow 1126 Mo 356 - qu. whether see non dig. -

But if that which is agreeable to testator's intent can be separated from that which is contrary the former is good - Ex. Testator directs an absolute devise - Immediately annexes a condition - cond. void - devise absolute Pow 1127. 1 Leon 113

A devise may fail because if operative it would effect no more than the law would effect without it - Ex one devises land in fee to his own eldest son or heir - devise is idle & void - the son takes by descent. Pow 1127 Dy. 12. 124 - 354 - 1 Vern 17. Hob 29. 2 Atk 57. Sand - 248 Plowd 545 - Cowp 120 2 P.C.O. 135 - P. 397 Sal 233. 590 Stra - 187. 2 Vern 880 Bl.R. 187. 2 Co 51 - L. Ray 523 - 27.

Latent Ambiguities.

As to what acts will break the line of descent see. Cod. 12. 1 Shan 93. Sal 337. Earth. 111.

The rule is gen. that if one devises to a person who is his heir the same estate — i.e. the same quantity of interest in the subject matter as he would have taken by descent the devise is void — He shall be in by descent & not by devise or purchase — Raw 127. 30. 35 — & Ray 728 —

The reason of the rule is — first — that the lord may not be defrauded of the fruits of his tenure Raw 335. 440 — 2 — That devisor's creditors may not be defrauded of their debts (Raw 438. 530 1 Freem. 248) as they might have been before the Stat. against fraudulent [illegible] devises — 3 & 4 — W & M. see Wms. 378 Raw 171 —

These reasons have both ceased — but the rule is still of consequence in Eqy. as affecting the course of descent from the heir 2 Vs 220 Raw 175 — 3 Sw. 127.

In Ct. not important — — neither of the above considerations operate here (Rome) But suppose a person leaving two heirs A & B devises half his estate to A & dies intestate as to the other half — Will not the first which is considered as descending be first applied to the payment of debts? Yes — But this does not seem to render the rule important here in the sense contemplated — for the case is not within it — A would take by

Stra 1270 . 8 B/R 22 2 Saund . 8 n 4

Wills in favor of natural children are to receive the same construction as those in favor of other persons. It is always proper to look into circumstances dehors the will to ascertain whether there are any persons answering the description of the legatees named in the will & if there are none such then the situation of the testators family may be shewn to ascertain who were intended. Ex. "To my children" - if he has legitimate ones it cannot be shown that others were intended - if he had none it may then be shown that he had illegitimate ones whom he had recognized 2 Paige 11 1 Ward R 430

So if one seised in fee on the part of his mother devised to his ex^r for 16 years to pay debts rem^r to his heirs on the part of his mother the heir is in by descent 3 Lev. 127 2 Saund 96 n4

Bat. 242
Pr. Ch. 222
Ld R 829
Com R 173
2 Bean. 11
Dy 124a
Lord. 545

1 Sutto. 792
..... 797
2 Atk. 293

devise according to the distinctions in Paw 1129, 61

If one devises to his heir by way of remr. what would descend to him on a recovery still the case is within the genl rule - for the estate is not altered. Eg "To my wife for life remr. to S.S. he being devisor's next heir - devise is void Paw 1130 - Sti - 1118 1 Roll 626 - Stra 1191 2 Leon 101 3 Co. 118 Sal 234 - Com 82 1 P.W. 23 - L.C. R 508 - 8 Leon 127 So a devise only of an estate for life to devisor's heir at law if no further disposition is made of the subject matter - for he takes all the interest which he would have taken if there had been no devise - & the fee simple which descends merges the estate for life Paw 1131. 8 Leon. 26 -

Charging debts or portions on an estate devised to the heir of devisor does not enable him to take by purchase - the quantity of interest is not altered - the property only is encumbered - Paw 1133-5 - Cro E 919. 833, Mo 614 2 Ves 156. Com 72 - Sal - 241. Stra - 1270. 3 Ves 22 - L.C. R 728 - 2 Saund 8 n 4

But it has been holden that if the charge on the land is by way of condition the heir to whom it is devised takes by purchase Eg. "To my eldest son & his heirs upon condn. that he pay &c" Paw 1136 - Cro E 161 2 Mod 286 1 Ven 218

But the weight of authority is against ~~this decision~~ the distinction Paw 1133 Com 72 - Sal 242 - Cro E 833-919. he is in by descent

Latent Ambiguities.

& not by purchase - only qualified - If then a devise is made (which falls within the genl. rule) to the heir who at devisor's death happens to be a daughter the birth of a posthumous son will divest the title - Pow 438. 2 B 1208 -

But an alteration by devise as to the time of the heir's receiving the estate does not enable him to take by purchase (Pow 439. 1 B 30. 1 Sti 118 Sel 1234-41- Com 12) the quantity of interest being the same -

Yet if the limitation to the heir be by devise produces no alteration in the ~~estate~~ course of descent he takes by purchase - as devee Ex - If one having two daughters who are his heirs devises to them & their heirs they take as devisees - for the devise makes them jointtenants - whereas if they take as heirs they are coparceners - each having a distinct moiety Pow 439. Co E 431 - 3 Sen 12). 1 Leon 112 - Same rule obtains in Cts tho the reason does not hold - immaterial - Pow 545 2 Saund 8 n 4

So if one having two daughters who are his heirs devises all his estate to one - she takes the whole by purchase - for if she took only half by the devise her sister would be coparcener with her of the other half & the intent defeated. Pow 441 - Co. 8 103 - Sal 242 Com 123 - 10 R 829.

And a devise upon may upon the genl. principle in quest. may be good in part and

Devises

void in part as to one entire thing. Ex. Tenant in fee devises one half of Barn to A. his heirs in fee - the other half to him in tail - void as to the former good as to the latter Pow 442 - Co Ray 890.

A devise may fail of effect by the death of devee living testator - Ex "To A & his heirs" - A dies living the testator - A's heirs cannot take - & this is the case even tho the devise is republished after A's death - for it is to A & mean & his heirs - (But if a charge is created on the estate as debts or legacies the charge remains - 2 V. R 349. Vin. Tit - "Charge") 4 T.R 601 Plow 340.45 - 2 Vern 722 - Stra - 25 - Doug - 323 1 W. 397. Cro E 423 - Ray 1108 - 1 Mod 267. 2d. 313 - Pow 676 P. Ch. 439 Roll 118 -

By St. Vic if devee or legatee being a child or grandchild of testator dies before testator & no issue survive for such contingency the issue of devee shall take as he would have taken. St Vi. 548

Waiver

A devise may also fail of taking effect by devisee's waiving the benefit of it - The waiver may be express or implied Pow 1112 -

The waiver is express when the devee actually refuses to accept the devise - Pow 1113.

An implied waiver arises from some act of the devee from which it is inferred that he does not accept Pow 1113 -

Waiver

Gen.l rule in Eq.y that if a person having a claim upon part of what is devised independently of the devise and a claim to another part under the devise if he asserts the former he waives the latter – Implied waiver – Eg. B. land is settled on A for life – rem.n to his son B. – A devises B. land to a stranger & white land to B. – If B. insists on having B. land under the settlement he cannot have – B. land under the devise Pow 443.54 2 Vern. 581 232 – Toll. 176 –

This doctrine of implied waiver is founded on the idea of a tacit cond.n annexed to devises" that the devees do not assert claims the disposition the devisor has made" (Pow 445. 453 Toll. 176. 2 Ves 14-617.) he ought not to assert a right in opposition to the will & at the same time claim a mere bounty under it.

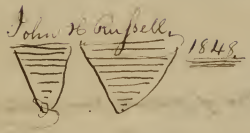
It is not necessary to give effect to the rule that the thing claimed be of the same nature or of equal value with that to wh. the devees has a claim independently of the devise (Pow 450. 1 Ves 238. 426) In such cases Eq.y will require the devee to make his election Pow 456 Toll 176 2 Ves. 14 –

But if devee is a creditor & not a mere volunteer the rule does not apply – Eg If one devises a part of his estate for the payment of debts & devises to J. S. another part to which a creditor has a higher title than devisee – the creditor may assert his right to the latter & still claim his share of the assets devised to pay debts – for the estate

Waiver.

Service in fee by deed without a matter of record may disclaim the estate devised & after such disclaimer he has no interest in the land 29 C. L 287. 2 Vent. 365. 371—

Waiver



devise to J.S. is the residue – The devise is not ex gratia but ex debito justitiæ – he here claims a right against the will & at the same time claims as a matter of Justice under it. Pow 1,454. 465 – 458 2 P.Co 112. 2 Ves 617

So if land to which A – has a higher claim than testator is devised to B. by an instrument not executed so as to pass lands & a legacy to A – he may claim the legacy & land both – Here the last condition does not apply – for testator has not disposed of the land – as to that there is no devise Pow 1,58. 1 Ves. 298. 307. – a nullity

But still if there is an express clause in the devise that a legatee disputing the will shall forfeit his legacy – his claiming the land devised as in the last case will defeat his legacy – for there is an express condn annexed to the legacy Pow 1,60 – 62 – 1 Ves 12 –

If testator gives a legacy to one in satisfaction or instead of a particular thing expressed – that shall not exclude him from another benefit the legatee's claiming the latter is contrary to the testator's will – . Ex. Testator's wife is entitled under marriage agreement to a portion in land & another in money – He gives her a legacy expressly in satisfaction of the money portion – & devises the land to J.S. – She may claim the land & legacy both – Pow 1,63. 2 Ves. 30 –) Her claim to the land is ex debito justitiæ – Testator might have intended the

Waiver

legacy as a satisfaction for both as he denies the legacy away – but he says expressly in satisfaction of the money portion – Eq. will not extend it by construction as a satisfaction for both –

And in all cases in order to oblige devee to elect (ut ante) it must be clearly evinced that the devee taking both interests will defeat the genl. intent of devisor – Eq. Testator having devised Bacon to his wife immediately devises to her White acre by way of remr – This does not prevent her from claiming dower in Wacre Pacc. 166 – E.R. 1138 3 Ath. 1130 2 Vern. 305 – 1 Ves 230. 2 Eq. C. 301. 8 Vin – 244 –

So a wife may claim her marriage settlement (the not devised to her) & a residuary legacy Pow 1169 – For in neither of these cases is the claim expressly repugnant to the testator's intention –

A devise may fail of effect by testator's performing in his life time what it was the object of the devise to accomplish – Ex – Testator devised £1100 to complete a building and afterwards before his death expended more than that sum on the house – Widow shall not have the benefit of that devise – Pow 1170 – 1 Vern. 95 –

So a devise may fail of effect in consequence of the St – 13 Eliz. W. 2 M. against fraudulent devises – Under this Stat – all devises of lands are void as against devisor's bond creditors – that is – the creditors are entitled to satisfaction

out of the lands if the assets fail — Heir & devisee sued jointly — Paw 1171. 2 Bl 378. 3 Bac 27. 3 Atk. 1134. 2 Ves 125 — 1 Plw. 129.

Before this Stat. devees (selling or alienating before action brot seizz Paw) held to the exclusion of creditors Paw. 1173 — Suppose no alienation 2 Bl 378. 3 Bac 27

This Stat. is liberally construed Paw 1173 2 Atk 205 —

The gen. law relating to the settlement of the estates of deceased persons in Eq. gives creditors a preference to devisees St. Eq. 168 p 22

The Eng. St. affects the relative rights of creditors & devisees only — St. does not relate to those of devisees & heirs — Therefore lands descended are liable to creditors before lands devised — the devisee is a purchaser. Paw 1174. 2 Atk — 435 — 3 Co 12 —

Admission of parol evidence to explain or control a devise

Every instrument consists of matter of fact & matter of law — the former may be averred & proved on an issue in fact — Eg. whether the instrument was executed — whether after execution it was altered &c — Paw 1177. 8 Co 155 —

But matter of law is not the subject of an averment — not triable by a jury — therefore not provable as a fact — Paw 1177. 8 Co 155 — Eg. Devise to "C & his heirs — — What estate C. takes is a question of law to be determined

as a matter of legal construction Pow 118). Commentary of the former kind is a latent ambiguity - of the latter patent - Ante 5 &c.

Hence a genl. rule founded on principles of C.L. that testator's declarations cannot be given in evidence to control the operation of the words used in his devise or to give them an import wh. upon the face of them they will not bear - This rule has obtained ever since devises were required to be in writing & before St. Francis - Pow 118. 501 - 678. Plowd 345 - Cro. Jac. 115 - 5 Co 68 2 P.Co. 136. 111. 1 Ver 63. 2 Ver. 217. 3 Mod. 358 -

Testator's declarations may apply to the devise or the person of the devisee - In both cases inadmissible (Pow - 118 6 B.R.C. 1 -) - that is - when they relate to matter of law - - viz - to matter of construction upon the face of the instrument

As to the import of the devise

Devise to "A & the heirs of his body rem.ⁿ to B & the heirs male of his body on condⁿ. that he or they shall not alienⁿ &c - Parol evidence not admitted to prove who was meant by "he or they" - matter of legal construction upon the face of the instrument. Pow 118 18). 5 Co 68 2 Vern. 98 Pow. 500 - 2 Ver. 216. 17.

So if one devise to his wife for life genlⁿ. parol evidence not admissible to prove that it was intended to be instead of a chance

If it be apparent on the devise that the testator intended to give a fee simple no extrinsic evidence is admissible to shew a diff.t intent
(Doe q. 10)

A devise of "my factory estate" or of my farm does not pass the tools on the farm or machinery in the factory, the being personalty
16 Lt 10

ind 16 & 11 on the admission of hearsay evidence

Where a sum of money is charged on the estate devised
& not on the personalty of devisee the devisee takes an
estate in fee 23 C. L. 180

In the construction of devises words of known legal
import, must have their legal effect unless the
testator use inconsistent words unless it is perfectly
clear that he did not mean to use the technical
words in their proper sense 27 C. L. 142.

Pow 1,80 1,60 1,5- Sp. R. 1,38 1 Eq. C. 219. So where a devise was on condition even letters written by testator were not admitted to prove that the events which had happened were intended by him to amount to a breach of the condition (Pow 1,80. Sed 232- 1 Vern. 333.) Immaterial if merely parol or in writing if not executed by St. Frauds &c-

So when on leaving unmarried to all his estate to his son in law for £1500 less than it was worth devised £1500 to the son in law - parol evidence not admitted to prove that the legacy was intended as a satisfaction for the covenant Pow- 1,81- Pr. Ch- 138. 1 Ves 231.

So on a devise to testator's daughter parol evidence of his intention that the land should not be subject to the husband's debts was excluded. Pow 1,84- 2 P.W- 316 1 Ves 189. 2 Atk 2,165/3

As to the person of the devisee

Testator's declarations &c not admitted as to matter of construction or fraud- Eq. Devise "to A" who dies testator living - Evidence not admitted to prove testator's declarations that B (A's son) should have what A would have taken if he had lived - Here no ambiguity patent or latent - Attempt to contradict the devise. Pow 485- Plowd- 345- Cro E 422-

So devise to the heirs of the body of A - if he die without issue to B- Testator dies A living - His issue cannot therefore take & parol

evidence of testator's intention to give to children surviving his life not admitted / Pow 1186 - 2 Sanders Pl. Ch. 54 - / for whether not his issue could take he living is a question of construction on the face of the devise / Pow 1187. / So testator having mentioned two women devised to her - parol evidence not admitted to shew which of the two was meant - Pow 500. 2 Ves 216.19.

But as to what are called matters of fact - i.e. as to latent ambiguities the rule is that parol evidence is admissible to explain them if the matter averred stands well with the words of the devise. Pow 1187.95 - 2 Shaw. 66 - 2 Ves 215 - Rule the same as to C.L. - conveyances Pow. 1195-87. - but not to contradict the words Pow 2.95 - 512.25 2 Ves 215 Doll 240 Pow 521.

Thus if one devise or grant to his son C - (he having two sons of that name) parol evidence is admissible to shew that the younger son was meant - the evidence stands with the words - Pow 488. 5 Co 68 2 P.W. 137. 1 Ves - 231 8 Co 155 - Latent ambiguity - & that testator supposed the store to be dead &c - his declarations can be proved Semb. Pow 1195 - 2 Ves 216.18 1 P.W. 674 6 T.R. 671. -

So if a devise were to J.S. of D. (there being two) Pow 1190 2 P.W. 137. 1 Ves 231. Pow - 1196 - 1 P.W. 674 -

So devise to C - of the manor of S. (he having two) parol evidence

admissible to prove which was meant Pow 488. 8 Co. 155
"Stands well" Le 2 Bro. Ch. 472 £563.4 Way 272 3 M.&R. 352

Parol evidence has been admitted
to prove whether an instrument was intended to be a deed or a
devise Pow 490 2 Ret. 310 1 Mod. 11 Ey. that directions were
given to make a will

So a devise is made to A (there
being father & son of that name) evidence is admissible
to prove that testator did not know the father Pow 492
Selby. 6 Mod. 199. 1 Atk. 411 2 Pl. 136.

If devisee is wrongly
named still if sufficiently described he may be proved
by parol to be the person intended Pow 340. 337. 405-7. 98
Co L 3a 11 Co 21a 8 Vin. 197. 1 Green. 293. 6 & R 67 - Dens
indeed said - Pow 498 Bacmap. 107. Ew - 11 Co 21
Parol evidence admissible as in case of devises. 4 Bruce 35

So devise to A. & Children (he having 6 - 2 by B. & 4 by
C) Parol evidence good to shew that the 4 by C were meant
Pow 491. 521. 2 Ves 216 - Parol declaration of testator
proved Pow 495 - £581

"But a devise to one of the sons of A" (he having several) is void - parol evidence not admissible - Patent
ambiguity - Matter of legal construction - Pow 488. 90
1 Co. 155 - 3 Ch. R 99 2 Vern. 624

If the name given to devisee
applies exclusively to one person & the description
exclusively to another it may be proved by parol that

the wrong name was inserted by mistake – Semb. 6 BR 671. Paw. 498. 1 Litt. 410. – Can any other proof be admitted in such a case?

So where testator gave a legatee a name she never bore – parol evidence allowed to prove that testator knew such a person & called her a nick-name. Paw 499. 2 Litt. 240.

So where the devise was to the poor of C. in the County of B. & C. was not in that county – parol evidence admitted to ascertain the parish Paw – 499. 2 Eq. C. 416.

But if the person wrongly named is not at all identified no evidence admitted to shew who was intended – & "Nuni" for "Nero" Paw 500. 2 Ves. 217. 8 "The evidence I suppose would not stand with the words" – Qu. Could it not be proved that the insertion was by mistake? see Paw 523 – Semb. not –

If words of equivocal import are used parol evidence admitted to assist the application of them – This is done not so much for the purpose of furnishing a construction (i.e. an explanation of the effect & operation of words understood) as an interpretation – i.e. an explanation of terms not certainly understood – (Marvin name' if the cases go further – but) & – one claim "senior" pueri" – Evidence admitted to shew that the eldest child was intended so that a daughter might take. Paw 340. 496 Dy. 337. 1 no 104 Hob. 32

Admission of Parol Evidence.

Doug 9 ungo.
Sutcli
3 Peck — 49
3 Burr 1808
6 Co — 16
2 R — 231

Admission of Parol Evidence

1 Brock. 472
A.C. 71
Pow — 518

71

The declar^n of testator on a reference to the state of his property is inadmissible to show a diff^t intent from that which appears upon the face of the will 14 Johns 1

Devise of $500. to st. during her natural life in addition a handsome support during her life to be furnish^d by my executors — held on that point proof that testator intended this devise sho^d take effect only on failure of the other resources to furnish her support was inadmissible — that she was entitled to her support under this devise. tho' she might be able to support herself by other means — that she was entitled to receive such support in any place she might choose to reside 11 Pick 252

So where a devise is to testator's "nearest relations" — parol evidence admitted to show that he knew certain persons answering that description — but no further (It is declaration not provable) Pow 497 — 1 Ves 231.

But in these cases evidence is never admitted to give words a sense which they will not bear on the face of the instrument — Eg — The word "son" is sometimes construed to mean a grandson — but not if there is a son living — qu — Pow 678 — But if it appear from the face of the devise that was intended to apply to a son only — no parol evidence admitted to show that the word son was meant to apply to a grandson — This would be to contradict the legal construction (Pow 501 677 3 Mod 318 1 Vent 340 Ray 468 2 Lev 248 2 Show 63 2 Vern 106 —) as if there is a legacy in the same instrument to the "grandson" Pow — 678. q.

Parol evidence not admitted to supply any thing not written Eg — "£200 to a charity according to the will of Mr _____. Evidence not admitted to show whose name was intended to fill the blank Pow 501. 2 Atk 240. Pow 523 8 Ves 195 2 Eq. C. 415 —

So where testator gave directions to have all his personal estate given to his Exr & it was omitted thro mistake — evidence of the mistake not admitted — Pow 523 8 Ves 195 — 2 Eq. C 415 —

Courts of Law & Equity have also permitted proof of extrinsic facts to explain matters of equivocal import as to the quantity of interest devised. ie — where the proof "stands with the words" Pow 502. 521

579 **Person of the devisee.**

1. Proof of testator's circumstances has been admitted to ascertain the quantity of interest – the import of the term being equivocal – Ex. Devise of testator "whole estate" to J.S. he paying testator's debts &c – evidence admitted to prove that the personal estate was insufficient to pay them & that therefore a fee must pass that devee might sell Raw 502. 7.8. Sti. 281. 93. 3 Kel 219 – Now settled that "estate" carries a fee unless restrained by other words – 1 Ld. Ra. 1112 – 2d. 657. 11 93. 5d. 502 – 6d. 314. 8d. 69 502 – 2 Ves. 50. 1 Bos. 559.

("Hereditament" does not ipso facto carry a fee it is a description of the subject & not of the interest in it 3 Ath 356. 5d. 558. 6d. 175 – 8d. 149. 1 Bos. 338 Sel 239)

So where the question was upon equivocal words whether a legatee of testator's personal estate took it absolutely or for life only, (she being test. wife) evidence admitted to prove that it was insufficient to support her unless she ate the principal or stock Raw 507. Pr Ch. 71.

2. Proof has been admitted for the same purpose as to the value of the property devised – (P 518. 506. 13) Ex. Devise of all testa. "lands" to A – he paying Rs. £100 in a year out of the land – proof admitted that this sum exceeded the annual profits of the land – to shew that a fee was intended – Raw 506 – 13 · Green 1179. 2 Eq. Ca 298 13 Ann 1898. Pr Ch 71 6 Co 1b

(Now regularly a devise of "land" charged with a gross sum carries a fee of course 3 Ath 356 – 5d. 13. 8d. 1. 503. 3 Ath. 311) & such evidence inconsistency

– life estate may be indefinitely short. 3 Burr 1623. 2 N.R 343 – 4 East 496 – Co. E 204. – Immaterial however great the estate & small the charge – still takes a fee Cowp 239)

In cases of land devised charged with the payment of debt of a sum the grand criterion is this – whether it is charged on the estate or on the person of devee – In the latter case he takes a fee – as to S.S – he paying Lo 8 S.R. 1-2 2 Bos – 250 – 4 East 500. 5 Co. 92. C. 8. 3 Burr. 1533. 1623 – 2 or 3 Leth. 341 –

But if charged on the rents & profits – he takes for life only – if they are not sufficient he is not bound to pay – cannot be a lease. 6 Co – 16. 3 Burr – 1541. 1623. 2 Bos. 250. 2 N.R 349 – "Shenent" 3 S.R – 356 – 5 East 87. 3 Ba Burr. 1541 – 2 Bos 252 – 2 N.R. 349. See a case in 2 Bl 381. n 13. of estate tail &c –

3. Proof admitted as to the condn of testator's family to ascertain the application of a term which may be either a word of limitation or purchase. Pow 518. 504 – Ex Devise "to C & his children" or his "issue" – proof admitted as to the fact of his having children or not at the time of his decise – If not estate tail is created – (Pow 505 – 6 Co – 17. Doug 309 1 Vent – 227. 31 1 Bulst – 219. 1 H. Bl. 156. 60 n SS 294 –) If he has children he & they take as joint tenants for their lives – S

4. Evidence admitted as to the state of testator's property to ascertain the meaning of words not in themselves equivocal but which when considered with

reference to the state of his property will bear and require a construction different from that which they prima facie import – 4 v "I devise the house called the Bell tavern to A" proof admitted that A was tenant in tail of the house & that devisor had only a reversn – in order to shew that an estate in fee was intended Pow – 508 Sed 234 Bacy 831 Holt 711 – 1 Bro, P.C. 108 –

So in Forman v Pointy 1 Bro P.C. 132 – evidence admitted to shew a cause an ambiguity where there was none on the face of the instrument – to explain the sense in which the word "sum" was used & direct the application of it – Pow 513 – – Here the proof "stands with the word" – tho not with the meaning which they prima facie convey –

But no enquiry which does not "stand well with the words" can be admitted – Thus where one devised "to the children A" (he having 6) evidence not admitted to shew that 4 only were meant Pow 524 . 1194 . 512 2 Ves 216 – Sch

So where testator devised the residue of his estate to his exrs – one of them being indebted to him £3000 – evidence not admitted to shew that his intention was to forgive the debt – for the residuary clause included it – Pow 522 – Sall – 240 Stra – 1261 – 2 Freem – 52 –

So when the reversion of testator's property was not disposed of – evidence not admitted to shew that

Admission of Parol Evidence.

Admission of Parol Evidence.

testator's intention was that his exr. should not have it Pow 524 – 2 Bac 1126 –

But parol evidence even of a testrs. declarations is admitted to "relut an equity" & "raise an implication" – not to establish it – "An Equity" means in gen. an equitable claim – But the meaning of the rule as here applied to a devise is this –

That where from the face of the devise equity raises an inference which is contrary to the legal conclusion arising from it parol evidence is admissible to relut or control the former which is in effect to establish the latter – Pow 524 – Ex – If land is devised to an exr. for payment of debt the surplus belongs at C.L. – to the exr. – In Eq. there is a resulting trust as to the surplus to the heir – i.e. Exr. is trustee to the heir of it – Pow 526. 8 326 –

In this case evidence is admitted even of testator's declarations to shew that the exr. was intended to have the surplus – (Pow 525 – 1 Ch. C. 196 – 2 Vern 252 (?). Salk. (?) 240 – L.R. 1324 – 14 Ves 323 – 2 Eq. C. 506) tho not to prove the contrary –

So where testator bequeathed £250 a-piece to A & B – & afterwards by a codicil directed her exr. to pay them £250 – each evidence admitted to shew that both sums were intended to be given. Pow 526 – 2 L.R. 1326) merely in support of letter of the instrument tho perhaps against constructive operation in Eq. – so said –

So where testator gave considerable legacies to his ex^tr. from which the inference in Eq^y. was that he was not to have the residuum evidence admitted of testators declarations that Ex^r. should have it - Pow. 527. 2 Vern. 677. Sell. 79.

And upon the ground that evidence offered does not contravene the will parol proof has been admitted to show that a devise was intended as a performance of a previous agreement - Ex. Agreat.. by marriage articles to settle £100 per ann. on the wife - Husband devises to her £100 per ann. - evidence admitted to prove that the devise was meant as a performance of the agreem^t. - (Pow 529, 1 Ves 823) but at distinguishes this from cases - ante - unless it be that in this the provision for the wife is exactly the same in both instruments & for the same precise object - viz - a settlement -

Parol evidence admitted in all cases to counteract fraud - Ex. One devised his real estate to his Ex^r. & omitted to charge his estate with an annuity devised to be - because the Ex^r. promised to pay it - evidence admitted - Pow 530 2 Vern 506

Revocations

Wills & devises are "ambulatory" till testators death - i.e. not consummated - therefore revocable by testator - Pow 550. 4 Burr - 2512 - Gilb - on D. 97.

Revocations may be

connected under two genl. views - 1 Are they stand at C.L. - (before the St. Fr.) 2. Are they stand under the Stat. Frauds & - Pow 532 - 629 -

1st. Revocations at C.L. - are of two kinds - 1 Express - 2 Implied - Express revocations at C.L. might be by writing or by parol -

1. By writing - as by a codicil or subsequent will expressly revoking a former Pow 532 -

2. By parol - as if one having made a devise expressly declares "I revoke my will" or use words of a similar import - Pow 535 - 652 - Doe 310b 1 Bell 615 - Cro. J 115 - 197.

But in this case it must be clear that the words are spoken animo revocandi - Therefore where testator said that because devisee did not visit him he should not have his land (but making no express reference to his devise) - devise not revoked Pow 533 - Cro. J 115 - Cro. E 51.

So words importing an intention to revoke in future do not revoke at C.L. - E.g. "My will shall not stand" or "I will alter it" (Pow 533 - Cro J 197 Mo - 218) or 8/4 - Cro E 306 2 Sid. 75 - Godolphin 156) Same rule holds since the Stat. of a similar intent expressed in writing Le Sent. 2 East 488. 95 -

II. Revocations at C.L. may be implied An implied revocation is by some declaration or act furnishing ground to presume that testator's intent to devise must be changed -

Revocations.

Here the revocation is implied – or a revocation in Law
Pow 532 Ex If one having devised to a stranger says
animo revocandi "my son shall be my heir" –
1 Ried 3. 1 Rev. 253 –

Rect. of devise amounting to a revocation in
law may be by writing or in fact. Pow 535-54. 2 Bl 294 –

1. By writing – In if one having made a devise afterwards
makes another inconsistent with but not expressly revoking
it – Revocation in Law – Ex One devises his land to A –
& by a subsequent will to B – or he first devises all his
estate to two & afterwards to one of them. Pow 535 – 6
3 Wils 511.12. 3 Mod. 206 –

Said however if one devises land
to A – & in a subsequent part of the same instrument
devises the same land to B – A & B take jointly –
Cobe & Hendre – think B only would take but weight
of authority is against them – I think it a mere
question of intention – Now if he remembered A – of course
he meant B should take all – & if he forgot him he
meant to give all to B – when he devised – Same as
if it had been in two distinct instruments: (1 Saunb. 4444 –
2 Atk – 374 – 1 Inst – 112. Cro. E. 9. 1 Vern. 30 –) (Not so as
to a specific legacy (Semb.) but the latter revokes. 2 Atk –
375 – And what is the difference whether it is real or
personal property – I am in both cases should be the same)

But a subsequent devise (not containing express words

of revocation) does not revoke a former one unless inconsistent with it – therefore the mere fact that a later devise exists tho found by a jury will not warrant a court in deciding that a former one is revoked by it – for the second may relate to a different subject matter – or it may confirm the former. Pow 536 541. Hardw. 374 – Shaw P.C. 146 3 Mod 203 – Cowl 90 Sel 592 3 Wils 497. 2 Bl R 937. 7 Bro P.C 344 Cowp 87.

And tho it is expressly found that the second is different from the first yet if it is not ascertained in what the difference consists the first is not revoked Pow 538. 41. 3 Wils 497 Bl R 937. Cowp 87. 7 Bro P.C 344 – causa qua supra 2 East 138

But if it were found that the second devise was inconsistent with the disposition made in the first the second would be a revocation – Sent. Pow 540

So a codicil inconsistent with the preceding devise to which it is annexed works a revocation – Ex Devise of B. acre to C – by a subsequent codicil giving W. acre to C – B. acre is given to C – Pow 541. 2 Cth 552 – 1 Ves. 32 –

But a distinction is taken between the revoking effect of a codicil & that of a subsequent will in this – that a codicil being part of the will & not in its own nature intended as an instrument of revocation does not revoke except precisely in the degree expressed – Pow 543. Swinb. 15 –

Revocations

4. Devise of lands to three trustees to a charitable use — By a codicil it is devised on the same trusts to 5 — i.e. to the same three & two more — the trust not revoked — Pow 544.5 1 Ves 176.8.186 1 Bro C. 444 Semble if it had been by a new devise —

Whereas (it is said by Pow.) a subsequent will or devise varying a disposition made in a former one is a total revocation — Pow 543 — 1 Ves 187 — Qu. is not the proposition too gen.? Semble it is

Note the case where one devised lands in fee to his son & by a subsequent devise gave the same lands to his wife for life. Pow 18.19.53). 40 C 24.7.8. Bro C 7) 21. 1 Ves 187 3 P. C. 345 n Cowp 87) Cute

If one makes a second devise inconsistent with a former one under a false impression as to a matter of fact which furnishes the motive for making the second — & the supposed fact is after his death found not to exist — the first is not revoked — Ex One devises land to C & afterwards by another instrument reciting that C is dead devises the same to B — If C is alive he will take Pow 546 —

But according to Pow., a false impression will not avoid the second devise unless it is the consequence of deceit practised upon the testator Pow 546 — Qu. No actual deceit — i.e. no wilful misrepresentation is supposed in his own examples — He seems from his

example to mean by "deceit" nothing more than misinformation & consequent misapprehension as to matter of fact — For the case which he distinguishes from the case of deceit is one where the misapprehension is as to matter of Law only — viz — "Being doubtful whether according to the rules of law or Equity I may devise my estate to the representatives &c. therefore" &c. Pow. 517. And in this case Pow. supposes the second devise good —

If a former devise is revoked by a subsequent one on the principle that the latter is inconsistent with the former the implied revocation as well as the instrument containing it is ambulatory till testator's death — therefore the latter being revoked the former stands Pow 549. 1 Burr 2512 — Perkins. 479

But (Semb)

if the second devise expressly revoke the first a revocation of the second does not re-establish the first if it remains in existence — (Pow 551. n. Compare 53 Doug 110) Because the revocation is express — an independent substantive act by which the former becomes immediately void (qre — Compare 92 — 1 Burr — 2512 —) This revocation does not depend on a subsequent disposition nor is it implied from it — independent act by itself — The rule is now well established — Semb.

Secondly — Acts amounting to an implied revocation may be by matter in fact Pow 551 — 552. 5 —

Cases 1. By total alteration in the relative circumstances of devisor – 2. By an actual or intended alteration in the estate devised – Powell 554 – 565 –

1 No alteration in the devisor's circumstances except that of marriage & the birth of a child has as yet been considered to be a revocation of a devise previously made (the devisor being a male) – But such an alteration of circumstances is a revocation – Powell 554 – 4 Burn – 2171. 82 1 Ph. 304. 1 Eq. C. 413 – Doug 35 Scot 592 – E. R. 441 – 2 Bl 376 – 1 Coll 243 – 1 Ves. 191. – qu – under special circumstances 5 Ves Jr – 663 –

So the child born is posthumous 5 B.R 49. A subsequent marriage only or the subsequent birth of a child only, is not sufficient (Seal) contra) to revoke a man's devise

But by St. 6 Ed. 548 the subsequent birth of a child alone is a revocation if no provision is made in the devise for such a contingency – even tho he has ~~no~~ other children –

The reason of the rule is generally said to be that from such a change of circumstances the testator is presumed to have changed his intention as to the disposition made of his property. Powell 559. 55. 56 – Doug 31 –

Hence any evidence written or parol is admissible to prove that his intention was not altered – i.e. to rebut the presumption – & His own declarations Powell –

556.q. 1 Eq.C. 413. Doug 31.35 - So R. 441 (qu. 5 Ves Jr. 448 664)
see 2 H Bl 522 - 2 Cent 530.43 -

So collateral circumstances may rebut this presumption as where testator devises his real estate in fee to the person whom he afterwards married & left ensient & gave only a legacy to his brother - such a change holden not to be a revocation Pow 556. 1 Eq.C 413 -

But qu. whether this is the true reason - for in the case of a subsequent marriage & birth of a posthumous child the devise is revoked (Bend) tho the conception was unknown to the testator — And e contra if he knew of the conception at his death & an alteration should afterwards happen there would be no revocation - yet his intention would not be influenced by the fact in the former case - but in the latter it might be 5 T.R. 58.q. And what legal effect can a mere intention to revoke have if there is no actual revocation. 2 Cent 541.2 -

What then is the principle? - According to Ld Brougham there is a tacit condn. annexed to every devise at the time of making it that the testator does not then intend that it shall take effect if such a total change should happen in his situation 5 T.R. 58.63 This principle is approved by Ld Ellenborough 2 Cent 541.2 - This idea at any rate reconciles the authorities -

But there has been no case

yet decided in which marriage &c. have been holden a revocation except where the disposition has been of testator's whole estate Pow 560. 556.; 2 East 521

And it seems that if testator's subsequent & children are duly provided for either by the devise itself or by his dying intestate as to prevent the presumption of a change of intention does not arise from the marriage &c – or the last condition is not annexed Pow. 556. 60 1 Eq C 113 – Doug 38 n 10

Marriage &c will not revoke a devise made in contemplation of such events & providing for the future wife & children 2 East 530 Doug 39 – Absurd to say it is revoked by events on which it is to take effect

But if a feme sole having made a devise marries it is on Eng principle clearly suspended during coverture so that if she dies before the husb. it is revoked – for it is of the essence of a will or devise that it be in the testator's power to revoke or confirm – But in Eng. a woman during coverture can do neither Pow – 563 – 11 Co 61 – 1 Ld Ray 181 – 1 Ba 291 – 11 Vin – p. 160

But if the wife survives the husband & then becomes again sui juris will it revive of course? According to Powell's opinion it will – this opinion is wrong & semb. Pow 562, Plated 343 – (qu 11 Burr – 2513 arg.) 2 T.R 695 – 2 Bl 1, 99 n 5 –

In Ct. it is clear that the devise is not affected in these two cases any more than that of a man would be — for by civil law a woman may make a devise during coverture. 8 Ct. Ante.

Certain alteration in the natural capacity of testator (tho such as renders him incapable of making or revoking a devise) does not in itself work a revocation — for upon the change he has no will — no natural power of revoking. Pow 564, 723 — 4 Co 61 — Cand 181 1 Eq. C. 234 — 1 Vern 105 — therefore no presumed change of intent — this is well established — But qu. Does not the same reasoning apply as well to the case of coverture? — Ante 592 In that indeed there is a change in the relative circumstances — but her will is not revoked on that ground — but on the ground of legal want of will — & here is a physical want of will which amounts to the same thing in law —

III An act in pais amounting to an implied revocation may consist in an actual or intended alteration in the estate devised Pow 552.4 532, 565 —

1. Of an actual alteration

In these cases the revocation is a consequence of a rule of positive law — the intention of the testator not regarded — not founded on any presumed change of intention Pow — 565.82.607 2 Cath 579 1 Bro 594 — Seen in the case of

revocations effected by an intended alteration Pow 565-606.7 1 Bos 594 1 Roll 615-

The positive rule or principle referred to is this - that as devises must be seised (at the inception of the devise) of the estate devised if a freehold - so the estate must remain in the same plight till its consummation Pow 184.6.566.611. - that is - it must in contemplation of law have been in his seisin & remained so till his death 1 Bos 576 - 1 N.R. 401-

Hence any alteration in the estate (between the inception & consummation of the devise.) which puts it in a different plight works an implied revocation Pow 566 - 1 Bos. 576 7 J.R. 399. 2 Ves.Jr. 516 -

Such alteration in the estate may be by act of the devisor - by act of a stranger or by act of law Pow 566 -

By act of devisor. 1. Sale of land devised to a third person will revoke the devise. Pow. 567 So testator having an absolute estate in lands &c. makes an alteration in the legal estate only retaining the beneficial interest (or equitable estate) that revokes a prior devise of the land - 2. One having devise land makes a feoffment of it to a stranger to the use of himself in fee - devise revoked - for he holds the estate by a new limitation as a new purchase Pow 567. 1 Roll 615 (see Dyg. 113 - 1 Bos 592 1 Show - 92 1 Roll 253) 3d vid - 1 Wils 311 Pow 599.600 1 Bos 576 7 J.R. 399. 2 Ves Jun 417. 4 Burr 1960

He has not the same interest as at the time of making the devise—

So one having devised lands conveys it in fee & then takes a reconveyance of the same land Pow 567 1 Ro 1616 - Dy 113 - 8 Co 90 1 Bos 576 -

The rule is the same tho the conveyance is by lease & release in which case the actual possession or seisin is not changed Pow 568 1 Leth 576 1 Bos 576 Eyre Ch. J. con -

So where one having devised land made a marriage settlement limiting it to himself & his children in strict settlement remn., to his own right heirs - Pow 569. 1 Ves 440 . 7 B R 399. a new purchase

So a recovery suffered of land to the use of testator will revoke a prior devise of the same land Pow 570 2 Leth 325 - 3 Wils 6. 7 Bro P. C. 177. 2 N. R 401.

The preceding rule applies as well to equitable as legal estates - As if mortgagor having devised his equity of redemption conveys it in trust for himself the devise is revoked Pow 572. 3 2 Leth. 741. 579. 803 - Shum P. C. 154 - 1 Eq C. 111 2 Green 202 4 Burr - 1961 - (Dougl 22 - con) Notes under a new limitation —

And an alteration of an estate devised will operate as a revocation even tho the alteration made be never perfected to give effect to the devise - By Tenant in tail having devised conveys to S.S. for the purpose of barring a

recovery suffered to the use of himself in fee – the recovery is suffered but the devise is revoked. Pow 583 3 S & R 168 3 P.Wms 113 2 H Bl 523 7 S.R 406 2 N.R 401. – Rule not founded on supposed change of intention but because contrary to the rules of law –

So if a man covenant to levy a fine to the use of such persons as he shall name in his will & make his will & then levy a fine in performance of his covenants the will is revoked – Pow 581 1 Roll 611 3 P.Wms. 170 Sel. 241 –

(For in that case the fine does not relate to the covenant but a mere contract to convey in future – & the devise is made not by any one claiming the equitable interest under the covenant but by the covenantor himself – so note the diversity between this case and that of a covenant to suffer a recovery)

And the rule is the same tho the alteration made is expressly declared to be done for the purpose of giving effect to the devise provided the devisee is entitled as of a new purchase – Thus where one made his devise of a manor & then made a feoffment to the use of "such persons as he had declared by his will bearing date" &c – the feoffment was adjudged a revocation Pow 582 2 Leth. 579 Mo. 789 1 Roll 611 2 S.R. 687. Pr. 299. See Pow 656 – that the reference of the feoffment to the devise gave it effect – that operating as a republication –

Devises

If a man seised in fee but supposing that he has only an estate tail suffers a recovery to confirm his will it is revoked. Pow 582 2 Cath 803 – 2 Ath 1523 – for he holds by a new limitation under the recovery – And a specific devise of a lease for lives is revoked by a subsequent renewal surrender & renewal of it Pow 580 1 P.Wms. 575 2d. 188. 3d. 163 2 Vern 209. By surrender original interest is lost – & he obtains a new freehold –

The rule is the same as to specific devises of leases for years which are renewable. Eg. One devises a lease holden of C – and afterwards surrenders & takes a new lease of the same land Pow. 586. 2 Cath – 593 – P. Cas. 319. 2 Ves 1118 – for the interest devised specifically is annihilated by the surrender – & the terms of a specific devise do not include the new interest –

But leases for years being chattel interests may perhaps by devise notwithstanding a subsequent renewal if proper words are used for that purpose. Eg. "I devise all the estate he that I shall have in such a lease at my death" – or "all the leases that I shall die possessed of" – subsequent renewal does not revoke. Pow. 589 3 Cath – 171 – p. 199. Sect 227. 1 P.Wms. 575 – Devise of an after-purchased chattel interest is allowed by law –

So if the renewed lease is not completed at testator's death the devise is not revoked by the surrender – Eg. – Where Defendant's rent was not assented till after testator's death – no revocation –

Pow 592 - 2 Atk 593 -

And when the revocation depends on the mere fact of an alteration in the estate (independently of any supposed intention to revoke) there must be an actual & substantial alteration or no revocation. Thus formerly holden that if one devised land in fee & afterwards merely covenanted to convey it to a stranger - devise was not revoked by the covenant Pow 593 - 1 Roll 615 1 Vn R 249.

But now as court of Eq. consider an eq. agreement to convey land as an actual conveyance such a covenant or agreement will in Eq. be deemed a revocation if covenantee has a right to specific performance. Pow 594, 2 P. Wms 329 - 624 -

But a devise of the equitable interest in a trust estate is not revoked in Eq. by a change of trustees - & Cestui que trust having devised causes his trustees to enfeoff other trustees to the same uses - No revocation in Eq. because no alteration in the thing devised - i.e. the equitable estate - Pow 595 - 1 Ch. R. 23 2 Vn. 109 -

So if one having contracted by articles for the future purchase of land devises it & then completes the purchase - this is in Eq. no revocation - the equitable interest not altered - It is only "taking the estate home" Pow 596 Dang 691 - 811

So if mortg. having

devised from up the mortgage & this mortg. conveys the legal estate to a trustee for mor. this is no revocation Doug 681, n 710 Pow 597. Amounts to nothing more than a change of trustees – equitable interest remains as it was. Devise examines as a gen. rule that if one having an equitable interest in fee devises it & then takes a conveyance of the legal estate – devise is not revoked – no alteration in the estate devised – i.e. in equitable estate. Pow 599. 1 Wils 311 3 P.W. 170 2 Vern 679. 1 Roll. 616 – 7 T.R. 117 n

When several instruments taken together constitute but one conveyance or devise made in the intervening time between the ex. of the first & completion of the last is not revoked for all the part, take effect by relation from the first instrument – & Conveyance made to suffer a recovery – then a devise – afterwards a recovery completed – Pow 600. 1 Bl.R 251 2 Burr 1131 – 1962 – Bl.R. 605 – 706 1 Co 99 –

Le partition between tenants in common or co-parceners if confined to that object is no revocation of a previous devise by one of them – not an alteration of devisor's estate – it merely ascertains what before belonged to him – Pow 602 Roy 210 3 P.W. 170 n 18 – (3 Bro 85 7. 1 Sid 90 contra)

But if the deed of partition extend to any other object than that of partition, merely it will revoke a former devise – & if it contain any further disposition of the estate. 1 Wils – 309 – 3 Ath – 712, 50 Pow 608 –

Revocations – Acts in pais.

Note – In all cases where one has made ~~an~~ actual alteration in a certain ~~[illegible]~~ before devised no parol evidence is admissible to shew that he did not intend to revoke (2 H & B 518 3 Leth 711 2 Ves Jr. 117. 595 –) For the revocation is not founded upon a supposed intent to revoke – it is an arbitrary conclusion from positive law – presumptio juris de jure –

II – Acts in pais amounting to an implied revocation of a prior devise may be by an intended alteration in the estate devised – As if devor. attempt a disposition which is ineffectual either for want of formalities or of capacity to take in the person to whom he – (Dens & a subsequent ineffectual devise by owner of St. 29 Car. 2 –) Pow 605. 565 – Ex. One having devised land makes a deed of feoffment of it without livery of seisin Pow 606 – Mo – 129 – Poph – 108 . 1 Roll 615 – 3 Leth – 72 – 3. 803 1 H & B 349 Or having devised a rev. makes a grant of it but the tenants never attorn Pow 606 – 1 Roll 615 Or having devised convey by deed of bargain & sale not enrolled within 6 Months Pow 606.7. 1 Roll 615 1 Ves. 158. 80 These and similar acts amount primafacie to a revocation – for such attempts to convey imply an intention to revoke – Pow 606.7

But revocations thus effected being ~~being~~ founded on a presumed intent to revoke the inference may be rebutted by parol evidence Pow 607. 8 As where devor. on executing a deed of feoffment to his

If a will is traced into the hands of the testator & cannot be found after his decease the presumption is that he destroyed it animo revocandi unless the contrary is shown & a duplicate proved in the hands of another than the same fate 6 Mond 185 2 Magg Ecl. R 328 2 66 613 2 Phil. R 25 - 1 do 375 3 do 126 - 2 Adam 266 3 Starks 1715

upon me &c declared his intent not to revoke Raw 608 Ow-76 Gilbert 132-

So by an intended alteration which becomes ineffectual thro an incapacity to take in the person to whom &c- Eg One having devised to a alienee devises to a corporation - this is a revocation - tho the corporation cannot take (1 Roll 615- 2 Eq. C 359 1 Bro P.C 1,50 9 Mod-190 10th 2 37.) for the devise tho ineffectual as such yet implies a change of intent - So if a subsequent ineffectual grant to one who cannot take - Eg Grant of devisor's whole estate to his wife who cannot take - In law it can make no difference if part or the whole is granted - but in Eq. a grant of a reasonable portion is good by way of provision for wife - Raw 610 3 Atk-72-

So an alteration in the estate devised working a revocation may be by act of a stranger Raw 611- 1811 566- 671- As if one having devised is disseised & dies before re-entry Raw 611. 1811 566. 671 1 Roll 616 Holt 784 11 Co 51 - For the effect of disseisin see ante-

But a stranger cannot revoke a devise by tearing or cancelling it if it remains legible Raw 612. 52- 2 Vern. 461-

Ingenin. A subsequent alteration in the estate devised amounting to a revocation may be by mere operation of Law. Eg Devises made before the Stat- Uses were revoked by that Stat-

Raw. 612 Dy. 142. 1 Roll 616 2 Ves 419 – for the Statute transferred the legal estate (which was not then devisable) to the equitable & by consolidating them destroyed the devisable quality of the latter –

A devise may be revoked absolutely or conditionally – in whole or in part only Raw. 611 Ow. 76 –

Absolute & total revocations have been already considered –

Conditional and partial revocations

A mortgage in fee the at law an absolute revocation of a prior devise is now considered in Eqty. as only a cond.l revocation pro tanto – ie – to the amount of the debt secured – so that if devisee will pay the debt he may take the land – for the mortgage is regarded in Eqty. as a mere pledge of the legal title by way of security – & the mortg.ee's interest (even when a mortgage in fee) is considered as personal property Raw 614 1 Roll 617 – Dy. 143 – 1 Vern – 329 – 2 Ch. Ca. 154 Sel. 158 – 3 Atk. 718 – 805 – L.R. 9 C.P. 329 – 10 Ib. 329 –

So if the subsequent disposition were an absolute conveyance to a creditor that he might sell the land to satisfy the debt & account with testator for the surplus – revocation in Equity pro tanto Raw 619 2 Atk. 118 272 3 P. Ch. 32 1 Vern 111 3 P. Wms 444 1 Eq. C. 410 2 Freem 117 –

But a mortgage for years only is even at Law "a revocation of a devise in fee for the term only - the rev.n proper - In Eq.y it is only a conditional revocation pro tanto so that devisee may take immediately on paying the debt Pow 617. 8 Vin - 156 - 7 S.P. 110 3 Atk - 718

But it has been determined that a mortgage whether in fee or for years is an absolute revocation as well in Eq.y as at law of a prior devise if made to the devisee - ~~an~~ devise & mortgage inconsistent it is said - same person devisee and mortg.ee at same time - Pow 618 Pr Ch 514 -

Case of lease in fee 604 - Sed qu. - 5 Ves jr. 656 that even a mortgage in fee is no revocation - 8 Ves jr 117. 600 Qu. Is not the latter the better opinion? - The reasoning in the former I think is very artificial & insufficient - I think to defeat the intention of testator -

Revocation pro tanto may operate by diminishing either the quantity of interest or subject matter devised - Pow 623. 4 -

1st Thus if one devise in fee & afterwards lease for life to a stranger the devise is revoked only quoad the estate for life - i.e. during the life of lessee - not as to the fee - Pow 624 - 1 Ph 516 Geo C 23 -

So if one devise an estate on cond.n & afterwards expunge the condition

Conditional and partial revocations

- the condn only is revoked & the estate devised absolute Pow 624 - So if one devise to A in fee & afterwards by a subsequent instrument make a devise of the same land to A - in tail - the second devise is a revocation of the former to the extent of the difference between the two Pow 624, Co Lp 90 -

But tho a lease to a stranger is only a revocation pro tanto of a former devise - supra, yet a lease to devsee of the land devised to commence from devisor's death is said to be a total revocation - devise & lease inconsistent - one person to be at same time lessee & devisee of revsn Pow 626. Co 3 119 (Case of mortgage ante 603 see 5 Ves jr. 656 Pr. 1117. 600 contra - This equally artificial with that Semb - has been denied.

But a lease lodevise to commence in devisor's life time is even by old opinions no revocation for it may determine before devisor's death & so stand with the devise Pow 626 Co 3 119 -

2. As to revocation diminishing the subject matter - If one devise 3 manors to A & then revokes as to one of them the devise remains good as to the other two - One devises lands to his daughter & afterwards on her marriage settles a part of the same land upon her - the devise as to the residue remains. Pow 627. 8 1 Rol 617. 2 Vern 720 1 Eq. C 113 2d 771 2 Atk 208 -

Devise of B. here to L. & T. as joint tenants afterwards testator erases T's name this is a revocation pro tanto only 3 Bro. 16 2 L takes the whole. If to them as tenants in common T's part w ants leave gone to devisors heir 3 Bro 21.

Pt. Ct. 200. 13. 6. No devise of real estate shall be revoked otherwise than by burning cancelling tearing or obliterating the same by the testator himself or in his presence by his direction & consent or by some other will or codicil in writing declaring the same signed by the testator in the presence of three or more witnesses & by them attested in his presence.

Devises

Revocations under the Statute of Frauds. 29 Car. 2.

This Stat. enacts "that no devise be shall be revoked otherwise than by some other will or codicil in writing or other writing declaring the same (or by burning cancelling tearing or obliterating the same by testator himself or in his presence & by his express direction & consent) or unless the same be altered by some other will or codicil in writing or other writing signed in the presence of 3 or more witnesses declaring the same" &c Pow 629. 30

Note the requisites prescribed in the devising clause Pow 47-
2 514

Holden that this clause of the Stat. extends not only to devises of land strictly so called but also to legacies or sums of money charged upon lands - Both to be revoked in the same way Pow 630. 2 Cath 272 -

It does not affect implied revocations i.e. - such as are effected by a subsequent inconsistent disposition - marriage & birth of a child &c - It relates to express revocations only - Pow 630 Cath - 81 - The former remain as at C.L. & it does not abrogate the rule of C.L as to subsequent ineffectual attempts to effect an alteration in the estate devised 1 Ves 187. 1 B.P.C. 349. 3 Atk 73. 803 - Cite

The word "declaring" perhaps in some measure was the foundation for this construction for it is express that revocation shall be by no other means than such as it points out.

Revocations under St. Fr.

Revocations under this Stat. then may be by some other will &c (as prescribed in the first branch of the clause) – by burning &c – or by some other will &c (as prescribed in the third branch) Pow 631

In pointing out the two first modes of revocation the St. seems to be only declaratory of the C.L. – except that the words "will" or "codicil" in the first branch of the revoking clause are construed to mean such a will or codicil as would be sufficient to pass lands within the prior devising clause (Pow 647.8 – For after the devising clause a will of land not complying with it would be void & therefore not a will of land Pow 632 –

Whence the instrument contemplated by the last branch not being referred in construction to the words "will" &c. in the devising clause is construed to be an instrument of revocation merely – therefore not requiring the solemnities prescribed in the devising clause – Consider first & last branch together –

Hence a distinction between an instrument intended merely to revoke a prior devise & one intended to make a new disposition of the same lands & also to revoke – The one intended merely to revoke will be effectual if it complys with the requisites prescribed either in the devising clause or with those prescribed in the third branch of the revoking clause (Note the requisites) Pow 647.8

For if it complys with

the requisites in the devising clause it is effectual according to the first branch of the revoking clause (Pow 631. 647.8 –) & if it is attended with the requisites in the third branch of the revoking clause it is good according to that clause – Pow 647.8. 1 P.Co 643 P.Ch. 460 10 Mod 467

But e contra – It is a genl rule that if the latter instrument is intended to be both a disposing & revoking instrument it will not be effectual to revoke unless it conform to the devising clause i.e. attested in testator's presence &c – for the intention is to give to the second devisee what is taken from the first – or rather to take from the first what is given to the second – But nothing is given to the second – therefore nothing taken from the first – the first devise remains in force – ante – Pow 648. 632.3.9 3 Mod 258 Cartly 79 1 P.Co. 343. P.Ch 549. 2 Vern 741 2 Ath. 272. 1 Eq.C 499

But a devise to testator's heir at law the void as a disposing instrument if duly executed as such revokes a former devise 1 Ves 17.

But a disposing & revoking instrument may not comply with the requisites of both clauses – If it conform to the devising clause the revoking words are effectual within the first branch of the revoking clause – Indeed if good as a disposing instrument it would be effectual to revoke (impliedly) without words of revocation – i.e. it would revoke as at L.S. – subsequt incumbt disp.n ante

Revocations since 9th Fr.

Revocations effected by burning cancelling tearing and obliterating remain as at C.L. Pow 631

To effect a revocation in either of these ways it is necessary that the burning be by testator or in his presence & by his direction (Pow 629 630) Semble no revocation - i.e. - if it remain intelligible Pow 652.

Suppose the devise destroyed may the contents be proved? - No such case I believe - But note the analogy to deeds & records lost or destroyed by time or accident - 3 Pr 151 - 2 H.Bl. 263 - 1 Wils 16. Stra - 1186 -

Revocations effected by these acts are in the nature of implied revocations at C.L. - Hence the acts themselves (tho done by testator) are not considered per se as revocations but as merely furnishing evidence of a revoking intent Pow 633 - Cowp 52 - P.C. 346 - 3 Wils - 508 "outward visible signs of such intent" - Of course they amount to revocation or not as they are done or not animo revocandi - Thus if devisor should throw ink instead of sand on his devise - or having two should by mistake cancel the better instead of the former - there would be no revocation Pow 631 Cowp. 52 1 Pr 316 3 Wils 508 4 Burr 2515 -

But it is not necessary that the devise be totally destroyed - even the slightest tearing will do - will be a revocation if accompanied with a declared intent to revoke - As where one slightly tore his devise & threw it on the fire - but it fell off -

If one devise property to two as joint tenants & afterwards erase the name of one it is a revocation pro tanto seems if to them as tenants in common because the alteration would then operate both as a revocation & devise 3 B & A. 16 Larkin v. Larkin

& was taken up - but he declared that it should not be his will &c - Pow 635 - 2 Vs R 1043 -

~~But it is not necessary~~

So if there are duplicates of a devise & testator tear one part animo revocandi both parts are revoked Pow 637. 634 Com R. 453 - 1 P. Ch. 346 2 Vern. 742. Comp 119. P. Ch 460

Where acts depending for their effect on testator's intention amount in some instances only to "dependant" or "relative" revocations - i.e - when done with reference to another act intended to effect a new disposition - their revoking effect depends upon the efficacy of the other act. Pow 637.

Thus where one thinking that a new devise of his estate was completed when it was not tore off the seals from his first devise & then on being informed otherwise desisted & said he "was sorry" he & never completed his subsequent devise the first was holden not revoked Pow 638 1 Eq C 409. 2d 776 3 Ch R 155 - 1 P. Co. 248 8 Vin. 140 - Com 451. 4 Burr. 2515 -

A will obliterated in part by testator animo revocandi may be good as to the rest - Thus where one having devised all his estate to A - except Lo - afterwards struck out the exception - the part not obliterated remained good Pow 643 Comp 812 - Cite

An instrument made under the revoking clause of the Stat. not valid

the testator's signature is on the face of instrument unless it was intended to authenticate the revoking part — Pow 649. 8 Sev. 86

No Stat. in Ct. on the subject of revocations — the rules of E.L. generally apply here — uncertain how far — Qu. as to revocations by parol — I think on Sup. C. once decided they were not good — As we have no Stat. wants it not be proper to adopt a rule of E.L. relating to deeds — that an instrument is to be destroyed by the same solemnities as created —

Republications.

A devise the revoked may if not actually destroyed be revived by a subsequent republication — for being ambulatory till testators death it may as well be confirmed or revived as revoked Pow 652

Cases before Stat. of Frauds as parol declarations were sufficient to revoke (ante 584) so they were sufficient to republish a devise Pow 652

Republications at Common Law

At E.L. republications were much favored of course very slight matters wants effect a republication Pow 652 — Thus if one having made a devise of his land should purchase other land & then declare his will as his will — or verbally declare that it was his will it would be republished & the land so purchased would pass

by it Raw 652-5 Dy 143- 1 Roll 618 Sti 344. 418 2 Show 48- 1 Root 82.3-

So if one having devised all his land to his exr. & afterwards purchased other lands should be applied to to sell the latter & should reply "No they shall go with my other land to my exr." - the devise wanted be republished & wanted keep the lands after thus purchased Raw 653 Cro E 493 Mo 404 2 Ch. R 72.3 1 Freem. 264- 2 Vern 209.

And according to one report of the case cited from 2 Ch. R. the testator's saying (on application supra) "my will is in a box in my study" was holden sufficient. Raw 655 2 Vern. 209. So where the words - "my will in the hands of J. S. shall stand" have been holden sufficient Raw 655- 2 Show 48- & ind - 1 Roll 617.

So any act subsequent to the revocation of a devise & shewing an intent that it should remain in force wants at P. S. amount to a republication - Raw - 655- Roll 617. & Delivering it to one in token of such intent-

So the a subsequent feoffment to the use of feoffor's will was holden to be a revocation yet the reference of the feoffment to the devise was holden to be a republication & thus to give it effect Raw 582-656- 1 Roll 617 Comp. 130 Ante post 614

But the subsequent appointment of new exr. & giving of a legacy was holden to be no republication of a devise of land Raw 656 - 1 Roll 618. post 614

-in port there acts being considered as affecting only personalty-

And it has been holden that the mere addition of a codicil taking no notice of the devise would be a republication at L.S. - Because the very act shews that the testator contemplated the devise as then subsisting Pow. 584- 659. 68. 73- 3 Atk. 180 3 P.W. 168 2 Vern 209- Contra Cro E 493 S.C. 1 Roll 618 S.C. 1 Eq. C. 406- where the codicil related to goods only-

But the letter of opinion seems to be that the mere addition of a codicil or the exn. of one not annexed & tho it relates to personal property only will amount to a republication of a devise - for it is a fresh further part of the last will whether expressed to be so or not & therefore furnishes conclusive evidence of testator's considering his will as existing - & being made in addition to it is of course confirmatory of it so far as it does not revoke Pow. 608 1 Ves 185 Cases the question under St. Jn. see Pow. 669. 2 Vern 621 1 Ves 689 1112 opinions contra

At any rate a codicil whether virtually annexed or not if it expressly import to confirm the devise will be a republication - Pow. 658. 61. Com 381. 9 Mod. 68 1 Ves. 1113 3 P.W. 329 1 Ves 489. 93. Comp 158 & "I ratify & confirm" &c

So it seems that any words in the codicil shewing an intent to confirm will amount to a republication - Ex "Devise

Devise to A. for life - then without other devise - then a residuary devise to A. in fee - Devise then purchased other estates & made a codicil thereby after reciting that he had made a will disposing of all he then possessed he thereby ratified it & gave A. a life estate in part of his newly acquired estate & devised the other part in such manner that could not take effect - held that the effect of the codicil was to make the residuary devise in fee of A. in the will applicable to the after purchased land 21 Geo 193 -

A codicil duly executed whereby testator confirms his will does not give validity to an unattested alteration in a devise of lands made subsequ.t to the ex.n of the will nor to a testamentary paper purporting to be a devise of lands unattested unannexed to the will & not referred to by such codicil 2 H & L 379 1 Burn 549

that this writing may be a further part of my last will & testament" Pow 663. 68 1 Ves 489. 442

Republications since the Statute of Frauds

Neither the Eng. St. or our own makes any express provision with respect to the republication of devises — But as the effect of republication is the same as that of devising (post) it is holden that no codicil or writing can amount to a republication of a devise of land &c — unless it comply with the forms prescribed in the Statute i.e. — unless accompanied with the requisites of a devise. Pow 80.2 664.86 — 1 Vern 329. 2 Ch. R 154 — 1 Sid — 162 — 1 Ven. 440 — 9 Mod — 78 Burnend — 192 — Parol republication then are at amend Pow 664.86 1 Vern 329. Cowl. 84 —

"No codicil" (says Pow 664) can amount to a republication" unless it comply with the forms" &c "I be signed & published in by testator in the presence of three witnesses" — cites Com 281 · S.E Cruf 160 9 Mod 68 Holt 748. 252 —

Qu. Must testator sign in the presence of 3 witnesses? — This is not necessary in the original devise — The case cited from Com. does not warrant the position — There the codicil was thus executed & holden good — — but such ex. not adjudged necessary — A republication is in legal effect a new devise therefore should be accompanied with requisites prescribed in the devising clause as to attestation in testator's presence — But as authority not overruled now stands a republication accompanied with the requisites of revoking clause is good — hardly so on principle

Republications since the St. of Fr.

The codicil to amount to a republication should indeed be published in the presence of the witnesses (Pow 664) as an original devise must be -

Decided in Ct. that a parol republication is not good. Supr. Ct. Augt 1800. Letth. Ex. - 1 Root 82.3. contra 1783 -

But the operation of this Stat. does not extend to implied or constructive republications - as the revoking clause does not to implied revocations - Ante Pow 666.7. If a second devise impliedly revoking a first is itself revoked the first if extant ipso facto revives - Cowp 92.91. *

So devises of leasehold estates are not affected by this Stat. - i.e. of terms for years Pow 667. 586.593 St. Ct. 257. "not land &c nor "real property" - but personal

Under the St. (as at C.L. - ante 344) no express manner of confirmation or are necessary it seems in a codicil to republish a devise - Suffn. if the devise is actually confirmed - Ex. "I desire that this writing may be a further part &c Pow 663.4.8 - 1 Ves. 189.

So also by the better opinion every codicil to a devise (see 7 R. 110) tho not actually annexed seem tho it dispose of personal property only will amount to a republication if executed according to the Stat. Ex. One devises his real estate & then merely executes a codicil giving pecuniary legacies | but executes not refuse Pow 668 1 Ves. 185 - (contra ante 344) | 1 Burr 554 Cow 881

9 Mod 78 3 B.R. 1884 3 P.W. 168 1 Ves Jr. 186. P. 98 - Contra 3 Rep. Ch. 90 S.C. 2 Vern 621 S.C. cited 1 Ves. 189. Pow 679. 81. Amb. 571.

If one having devised all his Copy-holds purchased more & surrenders them to the use declared in his will the surrender is a republication (& the latter will prob.) Cowp 130 But here nothing is said of the Stat & its requisites I suppose were not complied with (But this seems to be an implied republication & qu - whether such republication is affected by the Stat - Cute -

The effect of a republication is to give the devise a new date - It speaks & operates from that date so that the devise after publication will comprehend all such property & all such persons as it would have comprehended if originally made at the time of republication / Pow 674. 83 - Cowp 130. 58 1 B.R. 193 4th 601 / Whereas a devise not republished will extend to no real estate which testator had not at the time of making it 2 H.B. 523 - 1 B.R. 200 Cowp 130. 2 -

Genl rule that wills are to be construed according to testator's intention & state of things at the time of making them 1 P.W. 400 Willes 297 Salk. 444. 1 Lutw 581 Bertesque 182-4 - 8 Ath 225 If republished at the time of republication - Hence if one having devised "all his Lands in C" purchase other lands lying in C & then republishes the latter will prob. - Pow 674 Bro C 493 Mo. 404 Com 381

So if hav. devised all

his real estate he purchases more land & then republishes Pow 674 Com 381. 9 Mod 78 1 Ves 142 – Holt 748 7 BR 492 – P 204 – So if one devise to his son A – who dies & testator afterwards has another son of the same name & then republishes the latter will take Pow 670 – 1 P.Co – 275 – 3 Rel 845. 5 Co 68 –

So if one devise land to his daughter "not to be subject to any control of her husband" (she then having a husband) & after the husband's death republishes taking notice of the husband's death the restriction extends to any subsequent husband – 1 B.R. 193. The rule would be the same (Semb.) if he took no notice of that fact –

But the effect of a republication extends no further than to give the words of the devise the same operation as they would have had if originally written at the time of republication – Pow 676. Hence if one devise land called B. acre & then purchases land called W. Acre & republishes – W. Acre will not pass – So if having devised all his land in A – he purchases more land in B – & republishes the latter will not pass – Pow 676. 84 –

Hence also words used in the original devise as words of limitation cannot by republication be made to operate as words of purchase or description – Thus if one devises "to A – & the heirs of his body" & after A's death republishes A's issue cannot take Pow 676. 7 1 B.R. 601 P.Ch – 139. 2 Vern. 722 – Plowd 343 – Bro. C. 222 Ray 408 Willes 267. 2 Ves 313. P.Co. 397. Davis 337. Bro. Ch 219. 2. Ante –

Devises

So where one having devised land to his son R & given a legacy to his daughter R & grandson R. - republished after the son's death it was decided that the grandson R could not take the land - for testator's having used the word "grandson" showed that he did not intend to designate his "grandson" by the word "son" Pau 678 8 Mod 318 1 Vent 340. Ray 408 2 Lev 243 - 2 Show 83 -

(Note. Testator's intention is to be collected in gen.l from a reference to the state of things existing at the time of making the will - not of his death - Willes 297 Falk - 44. 1 Atk 284 Ante

A codicil may republish a devise as to part of the subject matter only - Eg One having devised his real estate to two reached it as to part of the estate by settling that part upon one of them & then by a codicil confirmed it subject to the settlement - held on that the other part should go to the two Pau 679. 2 P.Wms. 329

But a codicil cannot give the original devise any inherent validity which did not before belong to it - Its effect is to set it up in the same condition in which it was at its inception (Pau 680. 3 102. 10 Ante) Hence if the devise itself is not executed according to the Stat - a codicil which is thus executed will not confirm it Pau 680. 102. 110 Pr Ch 270 2 Vern 597 Molt 742 Cowl 174 2 Mod 262 1 Burn 584 - Sems of one entire instrument of which diff.t parts are written at diff.t times, Burn 549

Ld Mansfd. once held obiter - that if a man devise thus - "All the lawyer ark leases which I now hold" - & afterwards renew his leases those renewed words not prof by a republication. Pow 683. 586 2 Lith 593 - qu. for the words have the same effect as if the devise had been made at the time of republication Ante Pow 683 -

A devise may be republished by mere re-execution - & such a republication may supply an original want of capacity in devisor - by an infr. makes a devise & after full age re-executes it. Pow 686 1 Sid 162 1 Rol 589

A infr. may republish on the very day on which he comes of age - no fraction of a day. Pow 686. 1 Sid 162 1 Rol 589. Ante

Nothing which does not amount to a republication at Law will amount to it in Equity Pow 687. Cases 132.

Jurisdiction of Courts as to devises

The Ecclesiastical courts in Engd have no jurisdiction over devise of lands only, Pow 688, & a prohibition lies to prevent them from proceeding in the probate of devises Pow 683. 3 Rol. 30 1 Vent. 207 Cro. E 396 2 Roll 315 - 2 East 557. 8 post 624

But now if the same instrument contain a devise of lands & a legacy of chattels it may be proved in in those courts - (A prohibition was formerly granted quoad

the Lands 2 East 557. 2 Roll 315) But the Probate is as to the real estate of no avail – not evidence at L. L. – as to personal property it is conclusive Pow 688. 9. 703. 705 2 East 557. 1 Roll 315 – 1 Sid 141 Cowl 248 L. R. 732. Bro C 396 Bro J 348 Holt 180 Salk 552. 3 Leth 546 6 Co 23

In Ct. devises as well as wills are proved by the courts of Probate – But an appeal to the Supr. C. lies from their decisions in all cases – If the sentence of probate is affirmed no further proceedings are have – if not the cause is remitted with direction to the Judge to conform to the decision of the court above – Stat. 1. 21. 4 If the sentence of Probate is not appealed from it is conclusive 3 Dev 315 –

In Court of Chancy. will not set aside a devise from a suggestion of fraud in the making of it – for if the suggestion is true it is no devise Pow 690 – 1 whether it is a devise or not is a question of fact to be tried at law by a jury on an issue of devisavit vel non (Analogous to the issue on non est factum pleaded to a deed –) Pow 170 691. 4 3 Leth 17. 1 P. W. 548 2 Ves 183 2 Leth. 324 1 Ch 1 2 P. W 270 (Sums of a deed) Pow 692 2 P. W 270 1 Eq. C 406 2 Ch 121 3 Bro P. C 358. – P. C. 123 contra –

So whether testator was compos mentis or not is a question of fact to be tried at law Pow 692 695 3 Leth – 544 1 P. W 288 –

But there is a distinction between Chy. setting aside a devise for fraud &

and it taking from the devisee the benefit of a devise procured on a confidence which binds the conscience the Cattenway-le done - for here the existence of the devise is not questioned but the court decrees that devisee shall hold for the benefit of the party aggrieved. The ground of this jurisdiction is distinct from that over the devise itself - it is over the conscience of the devisee Pow 696 Vol 109. Ex If A agrees to give B £1000 in bank bills in consideration of B's devising land to him & the bills are forged - A will be made a trustee for B's heir for the breach of confidence which in Equity is a fraud Pow 696 1 P.W 288. 2 Vern 699 700.

On a similar principle it is holden on the other hand that if one about to provide by devise for his younger children is dissuaded from doing it by the heir promising to make the same provision - the heir is compellable in Eq. to perform his agreement Pow 699. 3 P. Wms 4 - Fraud.

And where one devised land to be exchanged for college land for A - But the college would not exchange - Ch. Jn. decreed that A. should have the land intended to be exchanged Pow. 699. 2 Ves. 564 In genl. questions arising simply on the words of a devise are to be decided at Law - But Ch. Jn. may decide questions of this kind if there are circumstances requiring interposition Pow 699 3 P.W 298

When the issue devisavit vel non is directed out of Chy, that court will mould the evidence & direct the application of it so that a fair investigation may not be impeded - & the court may require direct that one of the parties shall produce certain deeds or writings - that he shall not set up such or such an unconscientious defence - or that he shall admit in evidence a copy instead of the original devise Pow 100.1 & Pl. 296

Of giving a devise in evidence at Law

The best proof of a devise is the instrument itself - & regularly the best evidence is required in all cases Pow 108 - Therefore where one claiming under a devise relied upon a bill in Chy. exhibited by the heir (the Deft.) & recited the devise it was holden to be no evidence Pow 102 2 Rol. 35-71. Pl. 117. Cowel 295

So a devise exemplified under the great seal is no evidence to a jury in Ejectment - Pow 102 - Cowl. 416 - So the probate of a will in the Spiritual court is no evidence as to a title to land (Pow 103. Cowl. 2418) as to land the proceedings are coram non judice - Ante 518 Hence the probate of a will of land in that court is not evidence even if the will be lost - for such probate is a nullity. Pow 103 Lo R. 132. 4

But if neither of the parties has a right to the profn. of the devise a copy is admissible Pow 105-6 Lo R 135 Holt 298 -

Giving a devise in evidence at Law.

But yet it is said that the probate of a devise (not supra) accompanied with other circumstantial evidence is admissible if the devise is proved to be lost Pow 706.7.

And it seems that if a devise remains in Chy. by order of the court a copy of it is admissible — for it is a roll of the Court. Indeed where the Court in which it is lodged has jurisdiction over the subject matter a copy may be read Pow 707. 1 Rol. 117. Gilt. L.E. 74

Is not this the constant practice in Chy?

But if proof of the attestation is required that must be proved by a subscribing witness if either of them is living Pow 708 — This is a fact not provable in its own nature by copy tho the contents may be —

At law however one of the witnesses is suffn. to prove what all have attested — But he must be able to testify not only testator executed & that he signed in testator's presence but also that the others did the same — Seems he does not fully prove the exn. — On his thus testifying the devise may be read without further evidence Pow. 708 1 Ld. 741 Stra — 1254 Cite

And tho the witnesses are all present it is not necessary that they all testify to the fact of testators executing & publishing — If it were an obstinate witness might defeat the devise

Pow 709 Shinn. 413 Holt 742.

But if one of the witnesses refuse to swear it seems necessary to prove the fact of his attestation Pow 709 Shinn 413 –

And the subscribing witnesses are allowed to deny the fact which from the face of the instrument they are presumed to have attested Pow 709. 12. Shinn. 79. 1 BR 365 – 4 Burr 2224 Rol St. Tr. 1140. 1. 2. 3. 4 – Ex. their own attestation – testator's sanity – or his signing – (Yates J. once held contra)

And the testimony of the subscribing witnesses is not conclusive against the devisee – If they should deny even their own subscription the devisee might contradict it by other witnesses – Same rule as to testator's sanity &c – Pow 711. Stec. 1096 1 B.R. 365 Bull 264 – The Stat. does not require that they should swear to the fact

On the other hand their evidence if in favor of the devisee is not conclusive against the heir. He may contradict them. Pow 710. 712 Shinn. 79. Gill – R. E. 264 –

But a court of Eq. will not direct an issue to try the sanity of testator where the subscribing witnesses swear that he was sane unless the suggestion to the contrary is supported by some direct evidence Pow 712 3 Atk 359 –

Proving a devise in Chancery

It is usual in Eng. when a title to real estate depends upon a will to prove it in Ch. - especially if the will is of modern date Pow 111 -

The probate of a devise in Ch. is in effect conclusive upon all persons & prevents its being disputed afterwards even in a court of law - for if the heir or any other should after the decree attempt to contradict it Ch. wants ipso an injunction against him Pow 118 1 Wils 216 -

In the Ch. has no concern with the probate of devises or wills - Ecclesiastical

But Ch. will not enforce a devise proved unless the heir is forthcoming - i.e. to be found. Pow 114 2 Atk. 120

It has been holden that such a probate of a devise is not necessary - however in order to establish a particular claim under it in Eq. Pow 115 3 P.W. 192 - qu

And tho the heir voluntarily makes default yet the devise will not be declared to be well proved of course - Proof must be made as if it were contested Pow 118. 3 Atk. 27.

The Probate of a devise in Ch. being thus conclusive it is an established invariable practice in that Court never to decree a devise proved

unless all the subscribing witnesses if alive are examined - for the heir has a right to claim that all of them testify before he is disinherited Pow 718 1 Wils 216 1 Ves 177. Nol St-Fr. 445-

(The frontier of an instrument of Probate is to declare a devise proved on the oath of one witness & Rene-) But the probate here is no evidence of title -,

As the rule is the same in Eng., the one of the witnesses is beyond sea - His hand writing cannot be proved - For it is not presumed to be out of the power of the party claiming to obtain his evidence - Pow 719. 2 Ves 459. 1 Atk - 627. Shinw. 174

When a commission issues from Chy. to take depositions to prove a devise the devise itself is sometimes delivered out of the proper office on security given - & in some instances Chy. has ordered the Prerogative court to deliver it out on security. Pow 721. 3 - Stra 961. 1 Atk 627. Pr. 627. see 2 Fiel. 610.

A bill to perpetuate the testimony of witnesses to the devise of a lunatic will not lie in his lifetime - The lunatic may recover & revoke - Pow 723 - 1 Vern. 105 - 1 Eq. C 284 -

A devise of lands in trust for the payment of debts once supposed to include debts barred by St Lim. 2 Vern 141 - 2 P Wms 373 Prec. Ch 385 Comp 548 see 3 Atk 107 Amb 231 - But now that the St. does not run after testators death upon a debt not barred before - & that a debt barred before is not revived 1 Sch & Lef. 107 and 15 Ves 479 - and also 2 Vern Bea 275 Mos. 391 - 6 Johns Ch 294 that such debts by such devise are not revived -

Testator directed all his debts to be paid - specifically devised B. acre to C. & all the residue to D. & died seised of lands purchased after making his will - the lands devised to D. are first to be sold for payment of debts & then the lands descended 6 Mass 149 2 Bro Ch 257 3 P Wms 358

Executors and Administrators

Executors & Administrators are the representatives of deceased persons for certain purposes - i.e. as to their personal estate & as to their duties which affect the personal estate. Com 139 1 Brut 209 2 Ba 439. S. 28

An Executor is a representative appointed by the last will of the deceased & his duty as Exr is to execute that will. 2 Bl. 503 -

To make an Exr it is not necessary that the word Exr be used - suff. that the intention of the deceased to make such person his Exr appears. As "I commit all my goods to the disposition of J.S." &c. Lovelap 177 Swinburn. 247. 2 Bl 503 Godl. 82 Dent. 8. 12 Co 90 1 Com 234

Appointment of an Exr essential to the existence of a will. 2 Bl. 503 Dent 1, Plowd. 281 1 Brut. 111 2 Ba 392 Godd. 82 - S 508

A disposition of personal property in contemplation of death not containing an appointment of an Exr is called a testament (Dent 2. Godd. 2) It has been called a codicil (3 Ba 466 Godl. 270 Plow. 234,) in the civil law & is to govern in the disposition of the property of the deceased (Dent 2. Godl. 2 - 2 Ba 392) A testament may be a bill without a testament & vice versa S 508

Naming an Exr is by implication a gift to him of the goods of the deceased - he being bound to pay the debts - So naming an Exr makes a will. 2 Ba 392 Godl. 82 Dent. 3 Godl. Ch. 3 -

At C.L. a testamentary disposition of lands without naming an Exr was called a Will - tho not now so defined. 3 Ba 497. 1 Brut 111.

An Administrator is a representative of the deceased appointed by law thro its proper organ or minister - He is appointed in three

Executors and Administrators

cases only - 1. where no Ex^r is appointed 2 Where he cannot act as Ex^r. - 3 where he will not act as such - 2 Bl 1496 1 Com. 25

Ex^rs &c are considered in Chan^y as trustees to those who are entitled to the personal effects of the deceased - Hence the jurisdiction of Chan^y in cases of mere personal property between Ex^rs &c - & next of kin Legatees &c - 1 P.Wms 881 3 Ath. 526 3 Ba 28.

An heir is a person disappointed by law to succeed to real estate on the death of his ancestor. 2 Bl. 201.

A Devisee is the person entitled to real property by the testamentary appointment of a person deceased. 3 Ba 166 God. 271.

Legatee is one entitled to personal property by testamentary disposition &c - God. 271. 3 Ba 166 2 Bl. 512 -

The power of Ex^rs &c over personal estate is merely that of trustees except so far as they themselves are entitled to it - Over real estate in Eng^d Ex^rs as such have no power - for real estate was not originally testamentary. 3 Ba 392 Went 3.4 God. 21.8

Ex^rs may have the disposal of real estate like other persons by express appointment of the testator - So if lands are devised for payment of debts the Ex^r the not expressly empowered to sell is considered in Chan^y as the proper person to sell no other being expressly empowered to sell. 1 Ath 120 § 541

But trustees as such have in no case any such power - Neither have they any such right to real estate as such in any

case i.e. if the creditors will not be paid in their hands - the heir is then the proper person. Beauf. Bow 299. 1 Sw 304 1 Ch 176 - 544

Bacon said that in Ll. the Ex.rs represents the deceased both as real & personal property - Not correct - the idea seems to have arisen from the heir's not being liable as such to pay the ancestor's debts & from the demand real property being liable in the same manner as personal for the payment of debts - The Ex.rs &c have neither personal rem or jus in re - they are not even trustees of real estate as Ex.rs &c - vid. 1 Root 101 that intermeddling with real estate will not make Ex.r de son tort 2 98. 109

Ex.rs may have a power to sell in certain cases granted by Probate & so may a Stranger - On the ancestor's death the title to the lands not devised rests in the heir - It must be in the heir or Court &c & it has often been decided that the Court has it not & that he cannot maintain Ejectment pending the settlement of an insolvent estate he cannot maintain trespass - the heir must have the action tho he must account with the Court for the damages (decided in N.H.C.) the heir may therefore recover the land immediately & Probate may still order a sale afterwards - 2 Root 121

Letters of land sold under a power from a Court of Probate by an Ex.r signed by her not as Ex.r & in which she is not named as such nor the power executed upon does not pass the interest - such deed offered in evidence rejected (1 Root 105 Hud vs Castle C.C. 1802) Such omission relieved against in Eq. (1 Root 109 Pland. 525 2 Bac 188 Ent 29.9 Eq. 254

Executors and Administrators

A legatee receives his legacy thro the Exr. - A devisee takes posn. without the intervention of an Exr. (Vt Supr) Some hold in Ct - , But why so if the Exr - has the same authority over real as over personal property?

The personal property is liable to all the debts of the deceased - But in Eng. the real estate is chargable only for debts by specialty & debts of record. Lool. 95 3 Bl. 436 2 Atk. 378.

At C.L. judgt. debts bound the real estate from the first day of the term on which &c - & goods & chattels from the date of the exn. - Now by 29 Car. 2. they bind the lands as against bona fide purchasers from the delivery of the exn. to the officer. 3 Bl. 420

According to the old law judgts. bound the land in the hands of the heir from the time of the original writ purchased 3 Bac 26

Specialty creditors may resort to either the real or personal estate - if they resort upon the personal & it is not suffn. to discharge all the debts the creditors by simple contract are liable to lose their demands without any remedy at law since they cannot take real estate & are postponed to specialty creditors (Lool. 95 3 Bl. 430 2 Atk 377) But in this case Chancy. will relieve the simple contract creditors by letting them in upon the real assets for so much as the specialty creditors have taken from the personal - Chancy does this by ordering a sale of the real property in the hands of the heir - & the same indulgence is shown to gent. legatees. Pow. M. 377. Ball. 53 2 Ch. C. 1.5. 1 Eq. C. 14

Executors and Administrators

Assets.

If the assets of the sale are insuff. a mortgage must be made – & the spirit of these is adopted by our laws tho our laws subject the whole estate at all events to simple contract creditors –

Of creditors in equal degree he who first obtains judg. against the Ex. he is entitled to his whole demand even to the exclusion of the rest. 3 P.Wms 401.

Our law as to insolvent estates has established a diff. rule & in Eng. if one of two creditors in equal degree has commenced a suit in Law or as the rule now is but a bill in Eq. the Ex. cannot defeat his claim by a voluntary payment to the other. 3 P.Wms 401. 3 Salk. 247 Bro Ch 287.

In Eng. if land is devised for payment of debts the Ex. cannot for that reason be sued at law by a creditor as having assets – nor can he be compelled to make sale of the land for it if not considered as assets in his hands so as to subject him at law 1 Com 401 1 Roll 920 2 Atk 416 2 Vern 106

But Chancy. will compel the Ex. to sell & that even tho the claim is not to the Ex. if it is not to any other person. 1 Atk 420.

Assets what? – 2 Bl 510

Of assets there are several kinds – Real or such as descend to the heir & make him liable to such debts of & claims upon the ancestor as bind his real estate. 1 Com 398 3 Bac 22 Bellod 254 2 Bl. 244 302 340 3 Leo 286 Garth 127

2. Personal or afets intermeddling - or such property of the deceased as comes to the Exr. he as such & makes him liable to creditors & legatees. 1 Com Dig 2 Bl 510

Against Afets are either Legal - i.e. such as go in course of administration or according to priority of debts, - or Equitable. i.e. such as are distributed among all the creditors pro rata Pawlett 430 Pr. Ch 341 2 Vc Bl 112 -

An Eq. of redemptn. of a mortgage in fee is equitable afets, - for at law the whole estate is forfeited - so an eq. of redemptn. of any mortgage whether in fee or not is equitable afets, - tho in case of a mortgn. in fee mortn. has no other than an equitable interest - for there is no reversion. Pawlett 124 2 Vern 51. Pr. 251 2 Cth. 294 3 P.Wms 341 3 Ba 33

If lease in fee are mortgd for years the reversion in mortn. is ~~not~~ afets legal afets & creditors may have judgt. against his heir of afets quando acciderint - There is a stay of exn. till the reversion comes into posn. Pawlett 125 1 Vern 180 Pr 134 Sel. 354 2 Cth 294 2 Salk 8 n 4

In Ex. an Eq. of redemptn. is legal afets.

A Reversion expectant on the determination of an estate tail is not afets. 3 P.Wms 233 Pawlett 243

There is a contrariety in the books as to the quality of afets arising from the sale of land devised or directed to be sold tho not properly charged for the payment of debts. whether they are legal or equitable afets. 2 P.Wms 15 -

An Eq. of Redemptn. of a mortg. in fee is not legal, but equitable afsets 2 Ver. 61. 2 Saund 8 n 4

At C.L. an estate per autre vie is not afsets for the heir does not take the estate by descent but as special occupant 2 Saund 8 n 4 1 Burr 374 b 10 Co 98 a — Semble now by eq & ar 2 - 3 Atk 465 —

So lands which descend in tail / 1 Roll 269 B / or a reversion expectant on an estate tail is not afsets for it is in the power of tenant in tail to bar the estate / 1 Roll 269 (A) / 6 Co 42 58 Cartt 129 2 Atk 50 9 Co 176 2 Saund 8 n 4 / But when the reversion rest in posn in the heir it is afsets Cartt 129 2 Atk 204 Ted Sh. R 1230 2 Saund. 8 n 4

Ifone takes, ordinè in two steps, the effects in such steps must be those in contrariè Princip 465 Goldsch. 70. 2. N. 16. 291. 5 Grand. 261.

According to most of the other cases assets arising from the sale of lands devised to or subject to the payment of an Ex.r to pay debts are legal - on the principle that whatever comes to the hands of an Ex.r as Ex.r is legal assets. 1 Ver 224 Hob 405 1 Ver 63 2 Ab 248 405 Pr. Ch 127 136 2 P.Wms 532 416 n 1 Cth 420 Ba. Ab 331.

Yet the latest case & some of the other cases consider the Ex.r in this case in the double character of Ex.r & trustee & availing themselves of the latter character hold the assets equitable & the old opinion appears to be overruled - (Finch 196 2 Ver 133 1 Cth 484 2 Ab 50 1 Bro. C. 140 n Pow. Mw. 129) for money received by trustees is equitable assets by reason of the exclusive jurisdiction of Chancy over trusts. 2 P.Wms 416 2 Ver 133. 2 Cth. 50

But it has been holden that when lands charged with payment of debts are devised to the heir & are not devised i.e. where the interest does not pass by the devise they are legal assets - for the St. against fraudulent devises has given the Security creditor in such cases an action at law against the heir of obligor - 3 Cth. 320 Stra 1270 3 Bro 27. 33 2 P.Wms 416 Ba. Ab 430 Pow. Mw. 126. 2 Cth. 293

In conformity with the last rule it has been holden that money arising from a sale of lands under a bare power to sell for payment of debts is shall be legal assets - for the devise to the heir is not broken - Semble if the interest passed by the devise - 1 Cth. 484 Ba. Ab 430 1 P.Wms 430

Executors and Administrators

This distinction is eluded or rather by L. Hardwicke who holds that the descent was broken by a lease power to sell as much as by a device to sell carrying the interest by express words. Bro. C. 135-140 1 Brst 112 2 Atkins 285

Lands descending to an heir are to be applied to the payment of bond debt before lands specifically devised can be taken - this rule is reversed when the lands are devised for payment of debts - 3 Atkins 555 -

According to our law simple contract debt are not as sure first paid to debts by specialty - no priority founded on any distinction between diff. securities or evidences of debt, tho there is a priority in certain cases arising from the cause or consideration out of which the debt grows & from the privilege of the creditor - as in case of insolvent estates - funeral charges - for last sickness & dues to the State. H. C. 190

If testator charges the debt upon the heir & the creditors resort to the personal and the Ex. may come upon the heir for the amount - i.e. - where the testators intention is that the personal fund shall not be diminished - This is distinct from a former rule where the personal funds exhausted by bond creditors & simple contract creditors allowed to resort to the heir - The latter rule obtains only where there is a deficiency of personal assets -

In Ct. real as well as personal property is liable for all debts of the deceased - but Exr. cannot oblige the creditor to receive land in payment. 1 Root - 95 -

In Eng. the heir is liable for the specialty debt to the amount of his assets - the obligee may sue the Ex. at his option. Esp 248 Stra. 505 3 Ba 25 Plowd 441 3 Co 12 - Cro E 450 3 Lev 189.

If obligee may sue the heir for part & the Ex. for the residue but if he recovers judgt. of both & has a satisfaction of one the other may be relieved by bill & Inverdict - 3 Ba 25 3 Lev. 303 -

Ex. & Admr. are bound by the contracts of the deceased tho not named as far as they have assets except when from the nature of the contract it must be performed if at all by the testator in person - Yelv 103 2 Ba 448 Cro E 553 Eq. 14 -

The heir is not bound even in the specialty contracts of the ancestor unless specially named - for according to the feudal law no other property than goods & chattels & the annual profits of lands were liable to ex. on the personal contracts of the tenant - hence they now are not liable unless expressly made so. 2 Bl. 460 3 448 3 Ba 25. 9 2 328 Plowd 440 Hob 60 2 Roll. 472 -) Nor was the debtors body anciently liable to ex. 2 Ba 328

In an action against an heir it is necessary to allege & prove that the ancestor bound him - & even when he is bound or rather when the obligator deceased to bind his body cannot be taken in ex. but ex. goes against the land only (. 3 Ba 25 Rol. A. 926 n 2 Saund. 12 b 1 Sut 103 290 Eq. 81 2 Ch Abr 208) The land is appropriated to creditors not in fee but till the issues & profits pay the debt. Plowd 439

The land is liable in the heir's hands, otherwise the action

of Debt allowed at C.L. against him would be useless – This is the only instance in which bond could be taken in exn. in personal action at C.L. in behalf of a subject tho the King might always take the bond in exn. on defeiance of personal apeals – 2 Ba 329 3 Co 12 Co 5 250 Plowd 441 3 Ba 25 2 Rol 160 3 Ba 245.

Land of the debtor in his own hand were first made liable (in behalf of them) to exn. by 13 Eli. 2 Legit – Mr. de Mendonilus enabled the debtor to pledge all his lands by a recognizance in the nature of a recone cognisance. 2 Rol 160 5 Co 48 2 Ba 329 2 Roll 475

The debtor's person was first subjected to exn. for debt 2c by 25 Eli 8 which gave the Ca. Sa. 2 Ba 329. 2 Rol 414.

Exors. &c are sued on the contracts of the deceased only in the detinet – not in the debet – for they are liable only in respect of the property they hold for others – not in their own right – the charging in the debet & detinet is now cured by the 16 & 17 Car 2. 2 Ba 1143 5 Co 160 Sid 379.

Exceptions where the Ext &c is personally liable as he may be in certain cases as for rent accrued on a lease for years after testator's death – for here testator was never indebted & the Ext &c is charged in his own rep.n – &c also he is chargable in the debet in case of a devastavit after judg.t against him de bonis testatoris – for it shall not be charged with a devastavit on mere surmise. 2 Ba 1143 Sal 296 1 Roll 603 Cro E 411 Mow 5 56 Cro J 411. 510 Cro C 225 1 Mod. 186 1 Sid 398 5 Co 32 1 Vent 315. 325

Assets

The heir must be sue in the debt & declined - for he has apts in his own right & the debt descends with the land - charging him in the detinet only is remedy 10 & 17 Car 2 - 3 Car 29 5 Co 3 b Plowd 440 Fry 344 1 Lev 130 Cro E 12 1 Pl. 3 -

Ut. C.L. the heir could defeat the specialty creditors by alienating the land before action brot - but if he alienad after writ purchased or bill filed in Ch. the lands were liable in the hands of the purchaser - the judgt. had relation to the time of purchasing the original writ &c - (3 Ba 26) so that judgt. against the heir binds the land by retrospect - 1 Saunt 102 Barth 245 1 Mod 253

Now by 3 & 4 Wm & M. the heir in case of such an alienation before action brot is liable as in his assets to the value of the lands sold - the lands sold are not liable in the hands of a bona fide purchaser. (3 Ba 26 1 Eq. C 149 1 Pl. 777.) If the heir aliens after action brot is the rule as at C.L.? (Semb. so) 3 Ba 26.

Been holden that testator cannot bind the ~~heir~~ Ex. when he is not himself bound - Eq. Ca. cor. to take Ch an appendix - or that his Ex. shall pay £10. No action lies against the Ex. for the £10 &c - 2 Ba 1143 Cro E 232 qre Esp 199 Burr 1383. 8 Ch R 483. b.

Formerly lands devised were not liable in the devisee's hands to be taken for bond debts - here the creditor had no remedy either at Law or in Eq. - Now by 3 & 4. Ed. & M. devises of lands are void as against creditors - & the bond creditors may have debt against the devisee & heir both - & against them jointly - (3 Ba 27) Devisee cannot be sued unless the heir is joined (1 Eq. C 149 2 Ch 378 3 430 Esp 248 Pow. M. 399 2 Leth 433 Pow. D. 443 1 Pl. 29 2 Leth 125 -

A devise for payment of debts or raising portions for younger children is good not being within the Stt. & bond creditors cannot defeat it – they are paid only as other creditors are – pari passu. 3 Ba 27 1 Ro 430 775 – 2 Litt. 330

The heir of an heir is liable for the bond debts of the latter's ancestor tho' I suppose no farther than the first heir had assets & not so far unless he has assets of one equal amount from the first heir. 3 Ba 28 2 Ch. C 175 1 Vern. 400. Cy. 344.

Ex'tr. of the heir is not as such liable for the ancestors bond debts – for the heir himself is liable only in respect of the land – his person is not charged – But it is said if the heir claims the land to defeat creditors Chan'r will follow the money into the hands of Ex'r or heir – 3 Ba 25. 2 Ab 396 2 Vern. 62. 75 Ch. C 57.

In Ct. the heir as such is not liable to pay any debts of his ancestor – but if no remedy can be had against the Ex'r or the heir may be liable in Eq. on the principle that Chan'r will pursue the assets wherever they are. 2 Atk 203 2 Vern. 62 3 Ba 28 2 Ab 396 1 Com 266 2 Vern 75 –

Heirs as such are in Ct. liable at law on their ancestor's covenants of warranty & (according to decisions which have proceed sub silentio) of seisin – Qu. whether he can be liable in the latter case consistently with the decision in Tyler v. Heyward – in the French annos in the ancestor's life time – the Ex'r seems to be the proper person – Ex'r in these cases is also liable – In Lomax – the heir is not liable at law the warrant.

Executors and Administrators

Who may be an Executor

All persons who may make wills & many others may be Exrs. be a Bishop - Infts. in ventre sa mere - Vent 23 307 Lord 135 2 Bla 875 1 Com 235 1 Ath 124

If one appoint an inft. in ventre sa Exr & the mother is delivered of two or more they are all Exrs. 2 Bla 377 Lord 102 Vent 213. Lord 13

An Inft. cannot act as Exr. till he is of the age of 17. & till he attain this age an Admr. durante minore aetate must be appointed - 2 Bla 121 381 Vent 213 Lord 250 1 Ford 75 5 Co 29 a 29 Lord 153

Regularly the acts of an Inft. Exr under the age of 17 are not binding - Thus he cannot sell the testators goods or assent to a legacy - except that age he is not bound by his assent to a legacy unless he be capable to pay debts - he is not bound by receiving debts. 3 Bla 377. Vent 213. 17 Lord. 103 1 Ford 75 5 Co 29 1 Ch. R 257.

He cannot sell the testators lands for years even to pay debts if under the age of 17 years - But it has been holden that he may sell goods to pay debts or any other work by his orders - this is contrary to the gen. rule. 2 Bla 377. 1 Roll 730 Cro E 254 pl 2 Ld 503 Lord 153

An Inft. Exr. of 17 is bound by his acts as Exr if done answering to his office & duty as Exr - will be discharge a debt on payment 2 Bla 377 Vent 213. 5 Mod 400 5 Co 27 Moo 140 852 1 Com 246

But an Inft. Exr. of 17 or more is not bound by any acts to his injurious - Thus if he should give an acquittance or

Who may be an Ex[t]

or release without receiving payment, it would not bind him – because not done according to his office & duty, as Ex[t] – & if he were bound he would be subjected to accountant 2 Bra 378 Cro E 671 1 Brist 1 2[a] Vent 285 1 Com 240 1 Roll 920 Mod 146 & Co 2[a] –

An Ex[t] can in no case commit a departant till 24. Year & if a bond be forfeited & the Ext. Ex[t] release it on receiving the principal only, the release is no bar at Law for the penalty. 1 Com. 328 1 Com 240 1 Ford 5 2 Bra 378 1 Roll 920 Cro E 490

An Ext. Ex[t] tho' of the age of 17 years when sued must appear by Guardian like other Infants or it is error – he cannot make an Atty[ty] – for he has no remedy against the Atty[ty] for misleading or it is his neglect – but against a guardian he has – 2 Bra 378 3[a] 150 1 Roll 28[a] Poph. 130 Cro J 420 - 41 Palm. 220 Cro J 541 Cro E 141 Mod 49.

But if an Ext. Ex[t] sues as Ex[t] by Atty[ty] & recovers judg[t] it is not unreasonable, for he sues in outer court & the judg[t] is for his benefit. 3 Bra 150 Poph 130 Cro J 141

If an Ext. Tenant sues by Atty. it is said to be erroneous tho judg[t] be for him – (this distinction is probably founded upon the rule that an Ext. cannot act till 24. 3 Bra 150 3 Bulst 181 – 1 Roll 288 Cro E 41 contra)

If an Ext. be adult and Ex[t] they may both sue by Atty[ty] for the adult may make an Atty[ty] for the Ext. 3 Bra 151 Cro E 378 1 Roll 288 Carth 124 Vent 102 Mod 45 & 203 Ro 140 & 232

600 Stra 94

But if they are sued the Def. Ex. must appear by Guard. for he may be liable for misleading the pl. to costs & damages for which he has no remedy against the Party - tho against the Guardian he has - but Def. Ad. however is not liable even for costs 2 Roll 151 Hy. 318 3 Lev 236 Stra. 784 1 Roll 287

By St. 6 & 7 Vic. c. 85 an Def. may make a will & therefore may be an Ex. at 17 - By another St. every Ex. must give bond tho formerly Ex. did not give bond - But we have no St. expressly enabling Infts. at 17 to be Ex.

Bonus Concert may be Ex. according to the law of the Spiritual Courts - she is considered as a feme sole capable of suing & being sued alone & of taking upon herself the office of Ex. without her husband's consent & the C.L. controls the Spiritual Court in this respect. 2 Ba 378 Vent 202. 81. 91 Godb. 110 1 Com 235 Cro. 115

But at C.L. she cannot take upon herself the office of Ex. without the husband's consent (2 Ba 378 Cro. 115 Vent 200) Hence if husband dissent she cannot act & if the Spiritual Court should compel her to accept a prohibition will be issued - tho if husband actually administers she is bound by his acts during coverture so that if an action is brot against them during coverture she cannot plead ne unques Ex. 2 Ba 378 Godb. 109. 115

So if the wife administers without his consent & action is brot against them they are estopped to plead that she never was Ex. 2 Ba 378 Godb. 110

If a feme sole be named Ex. & marries before she intermeddles with

Who may be an Ex.

the estate & yet the husband administers this is such an exception as will hinder her & she can never afterwards have it – This rule probably supposes the infancy to have disentitled 2 Ba 378 Godl 110

A feme covert Ex.ix may it is said without her husband's consent make a will (or rather a testam.t) of such goods as she has as Ex.tx (2 Ba 378 4 Cont. 198 Godl 110) Others assert that husband's consent either before or after is necessary 2 Ba 49 1 Roll 608 Willo 211.

But it seems not disputed that she as Ex.tx may make an Ex.tor of the goods she holds as Ex.tx & this seems much the same as making a testam.t – for the Ex.tor as such will have the disposition of those goods. 2 Ba 49 Moor 430 2 Lev 92 1 Roll 608. 912

Bankrupt by the Eng. law may be an Ex. – but he may nominate others to the execution of the trust & they may be sued as representatives of the deceased. Com 235 2 Ba 374 4 Inst 305 Godl. 76

Corporations Aggregate cannot be Ex.tors – for they are bodies framed for special purposes & cannot take the oath to make the probate of the will. D. Ke 363 1 Com 235 2 Ba 375 Dent 17 25 Coulter 1 Roll 910 –

Corporations Sole may be Ex.tors – for they can take the oaths 1 Godl. 85 2 Ba 375 Dent.

According to the civil & canon law a villain, traitor, felon, outlaw & others could not be Ex.tors. Godl. 85 2 Ba 375 Dent 17

By the Eng. law no person is disabled from being an Ex.tor by

public offences against the Civil law - for they claim & sue in inter deaf - tho they cannot make bills as their goods are forfeited. 2 Bac 375 1 Brut 128 1 Roll 914 1 Dern 184 2 Bl 499 Plowd 26

Persons excommunicated cannot be Exors being excluded from the church they cannot dispose of the goods of the deceased in pious uses - this (Seal) is the only disqualification arising by the Eng. law ex delicto. 2 Bac 375 1 Brut 134 Godol 85

We have nothing to do with Excommunication & suppose no disqualification arising ex delicto.

An Alien by the Eng. law may be an Ex - he may have the disposition of Leases as well as moveables - for he holds in inter deaf (1 Bac 235 Bac Ab Tenant. p. 22) Sed. by the Civil law except in case of military testaments which are governed by the jus gentium - Godol. 86 1 Dent. 117.

It is a question whether an alien friency Ex can maintain an action as Ex. - it seems agreed that he may hold the effects & the weight of authorities is that he may sue 2 Bac 375 Bac Ab 583 Moor 731 Strain 370.

Idiots & Lunatics by the Eng. law are incapable of being Exors for they cannot execute the trust nor ascertain or determine rightly to ascertain it (2 Bac 376 Godol. 86) If a Ex become non compos administration must be granted to another Godol 86 2 Bac 370

The Prerogative Court cannot refuse to grant to any person because he is poor or insolvent - for hereby his creditors from

Executors and Administrators

the testator (2 Ba 376 Sel 299 Carth 457 2 Pr 361 1 Ld. 25 -
neither can they demand caution or security of the Exr
on proving the will as the testator has required none. 2 Ba 376
Carth 457 11 Vin. 359 1 Show 295.

(So Ex. all Exs whether poor or not must give bond. for the
faithful discharge of their duty - same formerly. St. 269)

But Chancry considering the Ex. as a trustee will compel him
like all other trustees to give security if insolvent. 2 Ba
377 Carth 158 1 Show 294 2 Vern. 249.

So where the Exr. tho not insolvent is wasting the assets
Chancry will oblige him to give security upon suggestion
of insolvency in the Ex. will order the assets of the deceased
not to pay the Ex - pendente lite. 2 Ba 379 1 Ch. 475

What persons may be Administrators

All persons who are not legally disqualified may be administrators
A person cannot act as Admr till 21 - for he cannot give bond
to the Ordinary as an Admr must. 3 Ba 121 Lord. 5 Carth 446
Ld Ra 338 Sel 39 5 Mod 395 12 Vin 194 501 2 Ba 381

The right to administer may devolve upon an Infr as
next of kin but he cannot administer till 21. 2 Ba 381 Sho 29

It seems proper to say that an Infr cannot be an Admr - for no
one is Admr till administn granted by the Ordinary - The
case of an Infr under 17 being named Exr - he is Exr by appointment
of the testator

Executors and Administrators

Femes Covert may (Semb) with their husbands consent be Exors. - for she may clearly be entitled as next of kin & I find no disqualifiction as there is in case of Infts. - It is inferable also from Mr. R's rule that femes covert are not postponed to others in equal degree commonly - She may be - 2 Ba 412 1 Com 249. b2

If a feme sole Exx. marries, the husband is liable during coverture for her acts committed before coverture even to a decrement (1 Ba 293 Cro E 603 1 Roll 33 Moor 761 Cro E 208 227 458 1 Sid 337) but here the husband is bound during coverture only but in Eq. the creditor may follow the assets into the hands of the husband after the wife's death - so also into the hands of the husbands Exx. (1 Ba 208 1 Ch. C 80 1 Vern. 309 2 Ch. R 118.) May not legatees & next of kin also follow the assets in Eq.?

Corporations Aggregate I conclude cannot be Admrs. - for they cannot take the oath to discharge the duties of the office - Sems of Corporations sole Semb. as in case of Exx. ante St. Ct. 153.

An Excommunicate cannot be an Admr. for he cannot dispose of the goods in specie nor - No such rule here - Ante 2 Ba 375 1 Brut 134 Godb. 85 -

An Outlaw may be an Admr. for he acts in auter droit & may sue - So (Semb) a felon attainted as in the case of Executors 2 Ba. 262 1 Brut. 128 2 Ba 375 Roll 914 1 Vern 184

An Alien may be an Admr. as well as an Exr. - course surpa - qua as to alien enemies - 2 375 Want. 17 Cro E 142 683 Moor 438 Shepp. 370

Deed & Senatus cannot be Exec.ts. 2 Ba 396 Gov. 86

Origin of Administration

It has been said that Administr.n - i.e. - the disposal of the goods of the Intestate belongs originally to the Spiritual Court. 1 Sev 158 186. Dal 37. 2 Ba 397.

According to other books the King by the old law was entitled to seize upon the goods of all intestates as parens patriæ & gard. trustee & dispose of them (9 Co 38 2 Bl 494 2 Ba 397) According to Selden the care & disposal of Intestate's goods belonged to the Lord 1 Comm 257 2 Ba 397.

The jurisdiction of Ecclesiastics in testamentary matters & matters of Administr.n is said to have commenced in the time of Rich. 2nd (2 Ba 397 1 Comm. 257.) Afterwards it seems the prelates were invested by the crown with this branch of prerogative except so far as it have been granted as a franchise to lords of Manors. 2 Bl 494 1 Com. 257. Pack. 480 1 Eq. & 206 9 Co 37) & the Bishops in exercising this authority disposed of the goods in pious uses. Bacon's 173. 2 Bl 494 Plowd 277.

This power of the Ordinary drew after it that of the probate of wills it being thought reasonable that the will should be proved to the satisfaction of him whose right of distributing the goods of the deceased was attached to it. 2 Bl 494

The Ordinary being unaccountable to any one did as he pleased with the whole that remained after satisfying the rationabilis pars or the thirds for the widow & children - for during the early period of the feudal system in Eng or even having a wife & children

could bequeath only one third of his chattels & Administr.ⁿ extended to no more - If he had a wife & no children half was at his disposal - If he had neither wife or children the whole was at his disposal & Administrⁿ was co-extensive with his right of disposal. 2 Bl 491. 4 Ab 122 -

The Ordinary was not bound to pay even the debts of the Intestate - but where a will was made the Exr was always bound to pay the debts, to the extent of the assets (Bac. 497 2 Bl 495 Sand.) while the law stood thus the Ordinary disposed of the goods in manner & did not appoint attorn. - 2 Bl 495

The first check given to the power of the Ordinary was by H. 13 Ed. 1 which obliged the ordinary to pay the Intestate's debt, to the extent of effects as Exr. were before obliged to do & it gave creditors an action against them. Bill 247 Hob 7. Cowb 378 2 Bl 495 2 Ba 398 415 1 Com 257 1 Sand 333 1 Roll 906

This H. is said to be in affirmance of the C. L. (3 Co 83 9 Co 39. b 1 Com 257) qu what C. L. - where is it to be found? 2 Bl 495 2 Ba 413 Bac 497.

The St. 13 Ed. 1 still left the surplus after payment of debt to the disposal of the ordinary (2 Bl. 495) & the abuse of this remaining power occasioned the 13 Ed. 3. by which it was enacted that in case of intestacy the Ordinary should depute the "next & most lawful friends" of the deceased to administer - 2 Bl 496 2 Ba 414 1 Com 258 Sand. 2 Bac 498

This H. is the origin of Administration - that is - officers of the Ordinary or persons appointed by the Prerogative Court to represent the

Intestate as to personal property - from this it appears that no Admr. exists at C.L. 1 Vb.Bl 679 ang. 1 Roll Ab 105 5 Co 82.b.

Before this St. Ordinaries had legal to appoint others to act in their stead but these could neither sue or be sued being servants of the Ordinary. 2 Ba 413 1 Sut 133 1 Roll 906 Kay 497 1 P.W. 8.

This St. enabled the Exors. appointed under it to sue for recovery of debts due to deceased as an Ex. might & subjected them to an action by Creditors as Ex. was before subjected & as the Ordinary was by St. Westm. 2 - But the 31 Ed. 3 did not oblige the Admr. to distribute the surplus after paying debts. 2 Bl 515 Godol. 253 1 Sec. 233 East 125 2 P.W. 447. Pr. 8.

Whereas the right of proving & administering the goods of the deceased may have originally resided the right of granting Administn. as well as of granting Probate of Wills, now belongs (except in certain cases) to the Spiritual Court in Eng. 2 Ba 398 Kay 405 1 Sia 359 2 Bl 494 1 Roll 905 Kay 497 Sed 37. 2 Ba 402 -

A bill cannot be given in evidence in a Court of C.L. to prove a title to personal property till it has been proved in the Ecclesiastic. Court - Sense of a Devise. Doug 684 Raw D 700.8.

It can said that the King as supreme Ordinary of the Kingdom may grant letters of Administn. - But has been denied (2 Ba 399 All. 53) Tho if a person dies intestate leaving no kindred the King grants Administn. by letters patent & the Ordinary admits the Patentee to Administn. - This admission is said however to be not de jure but from courtesy or respect - The Ordinary may in such cases dispose of the goods in pios usus for (Sent.) he is not obliged

in this case to appoint an Admr. — Or in case of a Bastard intestate the King according to usage is entitled to his goods. 2 Ba 399 Lord 5.84 Sal 37 2 Bl 495.505.

By usage Eccl. Bishops have the right to grant Administn. & prerogative but in no other way. 2 Ba 402. Ident 413 Sal 44.

In Ec. granting Administn. falls within the jurisdictn. of Probate An Admin. appointed in another State in which the Intestate dwell may sue to recover his effects in this State (Kirby 270 Dens in Eng. Lex. is not our rule right? 2 Ves. 35 2 H. Bl 406 Cont. 25. 1 H. Bl 154 677. 84 90 3 P. Wms 371 Milford 137.

Who are entitled to Administration

By St. 31 Ed. 3 the Ordinary was enabled to grant Administn. to the next & most lawful friends of the Intestate. & these words have been construed to mean the next of kind who are under no disabil (1 Ban 2 Bl 496 qto 39.) Yet it seems that the husband was always entitled to Administn. on the wife's estate under this St. 2 Ba 414 1 Co 51 1 Roll 910 Lord 2

By one case it appears the wife was entitled to Admn. on the husband's estate to the exclusion of his kindred. Ray 498 2 Ba 411 S.C.)

If there were several friends in equal degree the Ordinary might select the most fit of them Ray 498.

The Ordinary's power was enlarged by 21 H. 8 which allows him to grant Administn. to the widow or next of kin or to both — & when two or more are in the same degree he may grant it to which he pleases. — "Next friend" & "next of kin" seem to have been considered

as synonomous except that the husband & widow were included in the first words. 2 Bl 494 2 Ba 414 Sod 2 1 Ban 261

This seems to have been considered in some measure as explanatory of 31 Ed. 3. tho it gave the power of preferring the next of kin to the wife or of joining them - Stat. Ht. together are now the law in the law on this subject. Sod 2 2 Bl 494

This St. does not seem to give the Adminiⁿ to the husband on the wife's death but he has always been holden entitled to it Sod. 2. 2 Bl 504 1 P.Wms 381.

Adminⁿ were still not liable to distribute to the kindred of the deceased tho there has been some contrary opinion on this point. 2 Bl 515 8 Co 135 God 253 1 Sev. 233 2 P.Wms 149.

Now by St. Distributions 22 & 23. Car 2 Adminⁿ are obliged to distribute - tho husbands Adminⁿ on their wife's estate are by the 29 Car 2 declared not to be within the 22 & 23 Car 2 - Hence if husband dies before Admentⁿ taken his Exᵗ or Adminⁿ will be entitled to Adminⁿ on the wife's estate to exclusion of next of kin in Eq. & the Ordinary is said by Lord Ley 2. 3 to be compellable then to grant it 2 Bl 515. 3 Ath 526. 1 P.Wms 38 The husband is even called next of kin in one or two cases 1 P.Wms 381.

If the wife Exᵗ to another person dies administⁿ of the goods which she had do not go to the husband but to the next of kin of her testator. Sod. 3 3 Bol. 21

By 31 Ea 3. & 21 H.8 the Ordinary is compellable to grant

Administr.ns of the husbands effects to the widow or next of kin but he may grant to either or both at his election. Lord 3 2 Bl 494 Sal 36 Stra 552 1 Bom 264 Ray 93 1 Bl 351 1 Vern. 313

Where the husband leaves no wife Administr.n goes to the next of kin & among kindred those in the nearest degree are preferred - if in equal degree the Ordinary may take which he pleases. This is a gen.l rule. Lord 4 2 Bl. 504 494 Ray 498 Sal 38 —

Administr.ns when granted to two or more may always be joint & in some cases several. Several Administr.ns may always be granted of several parts of the goods - Ex. Of one part to the wife - of another to the next of kin. But of an entire thing as a bond for £100 several Administr.ns cannot be granted. If two are appointed they must be jointly appointed. Lord 4. 1 Roll 908 1 Bl 351 4 Sal 36 1 Sir 100

The degrees of kindred are computed according to the Civil Law - hence children are preferred to parents - for according to the Civil Law the computation from the deceased as terminus a quo & does not ascend among ascendants but in default of children - yet both are in equal degree. 2 Bl 504 2 Bac 415 Lord. 4 Godol. 253 2 Vern 126 —

The order is thus - 1. Children - 2 Parents - 3 Brothers - 4 Grandfathers &c - females are entitled equally with males in equal degree - Ev. Ch 527 1 Pl. 41. 3 Litt 762 P 455 2 Bl 504 Lord. 4

In computing the degrees proximity not quantity of blood is regarded - hence half is equally entitled with the whole blood 2 Bl 505 1 Vent 316. 23 425 Sty. 74

Administration extends only to the assets within the State where it is granted 7 John 47. 1 do 153 yet a voluntary payment to such administrator in an other State of a debt due there is good & a discharge from such admr is good 7 do 49 –

A power to sell contained in a mortgage of land here when mortgagor resides in another State may be exercised by his admr appointed in a diff.t State – for the exercise of such power is matter of contract & not of jurisdict.n – Probate of the will not necessary to the exr of a power to sell land contained in such will 7 John Ch 48 Sill & 169 Co Lit 113 a 2 Atk 362 369 2 Ves 78 a

Do the claim of the next of kin or next friend extend to their representatives so that their representatives as such exclude more distant kindred than their parents? The St. does not mention representatives nor do the books generally, as Vol. Lord. Godol. &c. But it seems according to one authority that under the St. 31 Ed. 3 the right of representation does obtain as in distributions (Bacy 498 2 Ba 414 -) qu. the order under this St. is said to have been 1 Husband or wife 2 Children & their representatives 3 Parents 4 Brothers or sisters & their representatives &c (Bacy 498) qu as to representatives. id 1 Root 52

If none of these characters will a creditor may by custom be admr. in Engd. - for he is next claimant (2 Vol 505 Lord. 5 Lod. 38) If there is neither husband or wife or next of kin the King according to usage appoints or rather recommends & the Ordinary appoints of course - Lord. 5. 84.

If an Exr. refuse or die intestate leaving goods unadministered administr. must be granted - tho in this case the 31 Ed 3 & 22 H. 8 do not govern the Ordinary but he may grant Administr. to the Residuary legatee in exclusion of the next of kin - for the 21 H 8 requires it to be given to the next of kin on the presumption that the deceased intended to prefer him - & here the presumption is rebutted - for the residuum is given to another & he may appoint any other than the residuary legatee unless he were disqualified - 2 Vol. 505 1 Vent 219 2 Ba 386 1 Ld 281 Stra 956

Suppose the testator died intestate as to part i.e. no Residuary legatee appointed - the next of kin (Semb) would be

entitled for as to this point the case does not differ from common cases of intestacy. 2 Ba 386 Cy. 372 Shep 25 Godl 230

If the residuary legatee when entitled to Administn. at supra also dies his next of kin & not those of the testator must have the Administn. Semble (Godl. 230) the Godl. speaks of an Ex. who is universal legatary or residuary legatee.

In default of all these characters the Ordinary may grant Administn. to whom he pleases as he might have done before the 31. Ed 3 & the person thus appointed may now it seems be a proper Admnr. - tho before this St. he was a mere servant or Atty. to the Ordinary - Or in this case the Ordinary may grant letters to such person ad colligendum bona defuncti - these do not make him Admr. but he is rather in the nature of a bailee or trustee to gather & keep the goods safely & to do some ministerial acts. Godl 5. 2 Bl 505 2 Strk 398 Went Exp. 14

When an Admr. durante minoritate of an Exr. is to be appointed the Ordinary is not bound by the St. on this subject for he is but a Curator for the Exr. & has no interest or benefit in right of the Exr. - he is not obliged to appoint next of kin to the testator or Exr. 2 Ba 381. Godl. 5 Ed 233 8 Mod 24, 14

By St. Ch. 165 Administn. belongs to the widow or next of kin & on their refusal or incapacity to some other person as the Court shall think fit. Mod 52

On the intestacy of a married woman in Ch. Probate may be granted to the widow or next of kin or both & to select among kindred in equal

degree in the same manner as in Engd - It seems in Ct. the husband cannot claim Admon (except as any stranger) So think S. Reeve has been no St relating particularly to intestacy of feme covert & no such genl St as that of 31 Ed 3. giving Admon to the next friend nor any such as 29 Car 2 declaring the husband right to administer without distributing or in any other way

In Engd the husband has been called next of kin - quoad hunc. (1 P.W 381) Granting Administn to the husband in Engd is not within the words of the 21 & 22 S. yet under this St. the husband was appointed.

If an unmarried person dies intestate in Ct. Administn as in Engd belongs to the next of kin & the Eng. rules as to degrees of kindred would govern - Our St. gives creditors no preference to any other strangers tho by usage they are preferred in Engd

In Ct. if a person having no kindred dies intestate his property real & personal belongs to the State by St. & Courts of Probate are to appoint Adminn to take care of it - This power seems to extend to both real & personal estate tho he cannot sell either - this must be done by the Treasurer of the State - the Admr is to take charge of & deliver it over to the Treasurer.

In Ct when an Ext. refuses to accept or give bond Admon is to be granted as it is in Engd in the first case - tho our law differs from the Eng. as to the person to be appointed. In Engd the Ordinary in such cases is not bound by the St. Rule - Here Administn is to be granted to the widow or next of kin & on their refusal or incapacity to one or more of the principal creditors & on their refusal &c to any others to whom the

Court shall think fit St. 163.

But St. 163. inflicts a penalty of $10 per month for neglecting after 30 days to appear & accept or refuse & the same penalty for neglecting after 2 months to take and inventory, after one plaine

In Engd if a person named as Exr does not appear before the Ordinary on being summoned to accept or refuse he is excommunicated. 2 Bac 403 God 60. 140. 2 Shep. 252. Dent 36.

Transmitting his trust

If an Admr dies his Exr is not Admr to the Intestate but Administr must be granted de bonis non. God. 6 Dent. 114. 2 Bac 385 2 Bl 506.

The Admr cannot transmit the trust reposed in him to another - for he has no interest except what he derives from the Ordinary. Smith. 396 1 Roll 907 God 230 1 Bac 251.) So if he dies his Admr is not Admr to the first Intestate - for there is no privity between the second Admr & first Intestate - & can have no Admr unless one is appointed on his estate - here the second Admr is appointed to administer the effects of the first Admr only - not those of A. Administr must be granted anew. 2 Bl 506.

But the Exr of Ex Exr A having proved the will is the Exr of A - for the power of an Exr is founded upon the appointment of the deceased & this appointment is founded upon a special confidence in the Exr he may therefore transmit it to any one in whom he has equal confidence - i.e. if he has proved the will. 1 Roll 907 2 Bl 506 1 Leon 275 1 Bac 251 1 Ath 466 Pr. Ch. 179

Executors and Administrators

If J.S. leaves two Exors. A. & B. & A. dies leaving C his Exor. surviving B's life. C is not Exor. to J.S. - the whole authority resides in B - but if after A's death B. dies, leaving C. his Exor. D. is Exor. to J.S. - 2 Ba 405 Sal 311 2 Vs 506 Salk. 127 1 Com 251

The Admor. of A's Exor. is not the representative of A - for there is no privity between them - the Admor. is commissioned to administer the goods of A's Exor., not those of A - therefore Administr. de bonis non cum testamento he must be granted 1 Com 251 2 Vs 506 Cod 230 5 Co 9 2 Ba 385 Daugh. 182 1 Roll 907

If before Probate the Exor. of A dies, leaving an Exor. the latter is not A's Exor. 1 Roll 907 2 Ba 386 Sal 305 Cy. 372.

Whenever the course of representation from Exor. to Exor. is interrupted by any one Administr. & all the goods are not administered administr. of those goods must be granted anew. 2 Vs 506 Hy 225 1 Roll 908.

Administr. de bonis non may be special ie. of certain particular parts of the effects, not administered the rest being committed to others. 2 Vs 506 1 Roll 908 Sal 36

If J.S. leaves his Exor. & A dies, leaving B an Infant his Exor. & Administr. durante ætate of B is granted to C. - C is not the representative of J.S. 2 Ba 381 Cro E 211 Hob 246.

Probate of Wills

The Ordinary may ex officio or at the instance of any party interested cite the Exor. to prove the will. Answering to some the Exor. may be cited at the instance of any person that the latter

may know whether he has a legacy left him or not. 2 Bla 1103 Godl. 60

In Ex. it is the Exr's duty to appear voluntarily within 30 days & prove the will or refuse - if he knows of the appointment.

The Ordinary may sequester the goods of the deceased till the will is proved. 2 Bla 403. Godl. 63

If it be uncertain whether the testator be dead or alive the Ordinary is to be the Judge of the fact & if there is good presumptive evidence of the fact death the will is to be proved - tho if the testator be living the probate is void ab initio the Ordinary having no jurisdiction. Semb. 2 Bla 403 Godl. 61 3 BR 129

The time within which the will ought to be proved is not settled by any precise rule in Eng. It is left to the discretion of the ordinary - the regularly it ought to be immediately (i.e. Semb. the existence of the will ought to be made known) to the proper officer within a few months from testator's death 2 Bla 403 Godl. 61.

In Eng. there are two modes of proving wills.
1. By common form - ex when the Exr presents the will without citing the parties interested & depose himself that it is the true whole & last will of the testator & the Judge upon this proves it. this is sometimes done where the will is not contested. 2 Bla 403 Godl 62

2 In form of Law - ex where the next of kin & widow are cited to be present & witnesses are examined. 2 Bla.

3

Executors and Administrators

When an Ex^tor proves a will in the Common form he may be compelled to prove it again in form of Scot. Law; where the first probate is in form of Scot. Godl. 62.

Probate of a will in Common form may be questioned at any time within thirty years next after decease where proved in form of Scot. 2 Ba 403 Godl. 62.

The mode of proving wills in Ct. is to examine witnesses but not ordinarily & commise to cite next of kin &c.

Executors Refusal

The office of Ex^tor being private & he being named by the testator & not appointed by law he may refuse to accept the Executorship in the first instance & then administr^on must be granted cum testamento &c. 2 Ba 405. 2 Show. 252. Vent. 36 Godl. 140

But it is said the Ordinary may compel the Ex^tor to prove the will & to make his election to accept or refuse the Executorship tho he cannot compel the Ex^t to accept. Godl 61

In Ca. the Ex^tor is not compellable to prove the will tho he must present it & accept or refuse it. 4 Co. 168

An Ex^tor cannot assign his office it being fiduciary. 2 Ba 403 2 Show 252.

An Ex^tor cannot refuse by any act in pais - only a declaration that he will not accept - i.e. this alone will not bind him it must be by some act recorded in the Spiritual Court. 2 Ba 403 Vent 39 Show 252 Cro Eliz 92

Executors and Administrators

In the case in Cro. & Cy. however when the Exr. refused the record was only that they "desired to accept" & yet the renunciation was binding.

If there is but one Exr. & he refuses Administr. is not to be granted & the Exr. can never afterwards prove the will at afterwards act as Exr. (2 Bla 405 Vaugh. 144 1 Roll. 907 Mord. 281) Qu. May he receive his refusal & prove the Will before Administr. granted?

But if one of two Exrs. renounce before the Ordinary & the other proves the will the first according to the Eng. law may at any time afterwards administer & he is preferred to any Exr. of Exrs. - for as the will is proved the Ordinary has no authority to take the refusal among the life of him who proved the will - tho he may afterwards & produce by one entitled all to act (Bat. 3 2 Bla 505. Moo 373 Cy. 161 Hand 110 Moo 89. 5 Co 28 1 Sut 292 9 Co 39 3 Ped 251 Bat 307.) But according to the Civil law the renunciation is presumptory & binding. Bat 34 3 Ped 251 5 March' 227 -

The Exr. refusing in the last case may release all of the testator & hammer be sued for any action but by the other - Seems where the action is against the Exrs. 5 Co 28 9 Co 39 Litt p. 512 1 Sut 292 Bat 307 4 Ped 505 2 Bla 881. 39 b.

After an Exr. has administered he cannot renounce - for by the act of administering he accepts the Executorship & determines his right of electing & regular himself liable to suits. 2 Bla 505 Bat 141 2 Sem. 72 2 Mod 140 1 Vent 303 1 Dent. 38 2 Sem. 182 1 Roll 907

Whatever the Exr. does respecting the effects of the testator & which shews an intention in him to accept the office amounts to an administn. so that he cannot renounce - any act which would make an Exr. a wrongdoer is an administn. & is accounted an election - as taking profn. of testator's goods & converting them to his own use. So taking a stranger's goods & administering them under an apprehension that they are the testators - Aliter if he takes testator's goods claiming them as his own - 2 Ba 406 1 Roll 917 Moor 14 Cro. 11

If there are two Exrs. & one without the other's consent takes profn. of a specific chattel bequeathed to him by testator this is an administn. - for a legatee cannot take the legacy without the Exrs. consent 2 Ba 406 1 Roll 917.

But in these cases the Judge knowing the Exr. has administered will notwithstanding accept his refusal & grant Administn. to another the grant is good & the Exr. can never afterwards assume the office 2 Ba 405 1 Roll 907 Dent. 40.

Yet if after Administn. granted only because the Exr. did not appear on summons to prove the will & the Exr. chose to accept he may do it & the Administn. must be repealed & if after the Exr. has refused & Administn. granted to another & it appears to the Judge that the Exr. has before Administered before (refusal bank.) the Judge may repeal the Administn. & compel the Exr. to accept 2 Ba 405 Dent 40.

If the Exr. appears & takes the usual oath that he will execute the office he cannot afterwards renounce - for he has by oath accepted - nor can the Ordinary refuse to admit him even tho

after taking the oath he had refused, if he does a Mandamus lies
2 Roll. 363 2 Bac. 405 1 Vent. 336

Manner of granting Administration

Administr.n must be granted by writing under seal & not by word 1 Com. 263 Ank. 294 Show. 108

It must be granted 1st when one dies intestate - hence the person entitled to Administr.n by Statute has a qual. authority & act for himself exclusively - i.e. not for any other who has a superior right - The Ordinary may take bond for due Administr.n in all cases even when there is a testamentary 1 Com. 263 Stra. 1139.

It may be granted jointly to two or more & if one dies the office survives - this is diff.t from the common case of delegated authorities - As a Letter of Letty. to two or more where on the death of one the authority ceases - but Administr.n is rather an office. 2 Bac. 416 2 Com. 240 63 2 Vern. 514 1 Litt. 162

Several Administr.ns may be granted of distinct things that of one entire thing. 1 Bac. 263 1 Roll 908 1 Sid. 162 Sal. 36 2 Bac. 416 3 Ch. 1 Vent. 12 Godb. 78 1 Roll 914

If person is made Ex.r without any limitat.n he cannot renounce as to part - by the remit receive a term the of Ex. exclusively and he must renounce in toto if at all & the same rule holds in case of Administration granted generally. 2 Bac. 394 Sal. 927 Yeld. 103

2. It was formerly doubted whether it could be granted to one during the absence of the Ex.r out of the realm - so where the rightful Administr.r is no absent. 1 Com. 263 4 Litt. 14.15 1 Roll 908 Sal. 142

Executors and Administrators

Sad. 192 b. Moa 304 2 Ba 415 P. R. 1011 3 Sal 23.

3. A temporary Administ.tn may be granted while the rightful Adm.tr is an outlaw or in prison (2 Ba 415 1 Roll 908) Why either case of an Outlaw? for he may sue & be sued as Ex.r & Adm.tr 2 Ba 375. 1 Sud 128 — Where Administ.ns were delivered the absence do of the rightful Ex.r or Adm.tr are removed.

4. It may be granted pendente lite of a will to cease when the dispute is decided — tho this was formerly doubted. 1 Bow 263 Bla 69 Bastard 423 2 P. W 57b 2 Ba 415 Sad 192. (Moa 606 Coutts 153 contra)

5. If there be a dispute about the right of Administ.tn it may be granted pendente lite. 1 Bow 263 Coutts 153

Where temporary Adm.trs are capable of suing & liable to be sued while their authority continues. 1 Bow 263. Coutts. 153 —

6. If the Ex.rs named refuse — Administ.tn cum testamento &c is to be granted — but not administ.tn de bonis non — for none of the goods are administered. 1 Bow. 268 Plowd. 279 1 Roll 907 Co 210 2 Ba 386 Sad 304.

7. If the Ex.r dies before probate an immediate Administ.tn is granted cum testamento &c. 2 Ba 386 Sad 305 —

8. If the Ex.r leaving actually administered dies before probate Administ.tn de bonis non is granted cum testamento &c because he died before he understood the administ.tn of the trust. So if one revoke a will & name no Ex.r an immediate Administ.tn cum testamento &c is granted — 2 Ba 286 Sad 304 1 Roll 907 1 Bow 268

Q. Mentionth. die leaving goods unadministered an administration de bonis non is granted. 2 Bac 285 2 Wms 1511 1 Roll. 907.

So if the Ex. die intestate after proving the will the administration de bonis non cum testamento is granted - for here the Ex. has administered in part - where the Ex. in this case die intestate the testator is said to die intestate. 2 Bac 386 Sal 304 1 Roll 907. Cro Eliz.

But admin. de bonis non is entitled to all the personal property of the deceased which remained unadministered & in specie. But if the original Ex. take a note for debt due to testator the acceptance of the note is such an alteration of the property that the note rests in the representative of the original Ex. &c. 2 Bac 386 Sal. 306 Shim. 143 Nelson. 173 2 Dent. 363 1 Roll 380

Formerly in Eng. if the original Ex. had not an action & recovered judgt. & before ex. taken out had died admin. de bonis non could not sue out ex. or in any way take advantage of not being proving to it (2 Bac 386 Yelv. 33. 83 Leiter. 140. Lid 29) Now by 17 Geo. 1 Sec 2 the admin. de bonis non may have a Sci. fac. on the judgt. where it is rendered on a record. 2 Bac 386 Leiter 290 Sal 322 Ld. 1072

10. If the Ex. be under the age of 17 administration durante minore ætate till he attain the age of 17 must be granted. 1 Com 258. 5 Bac 38 Trent. 309 Gell. 102 5 Co 29 Lil. 192 3 Atk 224

So if the person entitled to administer is an Idiot the administration must be granted durante &c. 2 Bac 381 1 Com 262 Shim. 155 5 Atk. 305 1 Sal 36 Com Dig 154 Sud. 193.

An admin. durante &c being but a curator for the Ex. the Chancery

may appoint whom he pleases 2 Ba. 381 Shin. 155 1 Ad. 250 Willes 39 Selw. 95

In 5 Co. 29 it is said down that Administr. granted ~~during~~ during the minority of an Infant Ext. under 18 determines on his marriage with a person of full age or he becomes intestate with her in her right of Ext. & is of full age to act. Denied to be Law. 1 Com. 250. 5 Co. 29.

If an Infant & a person of full age are Exors. administr. durante de is not granted to a third person for the one of full age may execute the Will & Administr. to a third person is void - tho it is said the Ext. of full age may take Administr. durante de & declare as trust. on Ext. Ecl. 193 2 Ba. 381 2 Lev. 239 Bacon 46

If two Infts. are Exors. one of the age of 17 the other under the former may execute the Will & Administr. durante de is not to be granted. In this case Lord, the elder cannot take Administr. durante de - for no person but an adult can be a trust. Ecl. 193 -

If J.S. dies leaving he his Ext. & he dies leaving he an Inf. his Ext. & he is appointed trust. durante de. of B. & not the representative of J.S. tho he acts for B. who is the Ext. of J.S. There must be a trust. of J.S. appointed durante de of B. 2 Ba. 381 Cro E 211 God. 230

Authority of an Administrator durante minore aetate

Said in Comyns that an trust. durante de. of one entitled to Administr. has for the time all the powers of an absolute Admr. 1 Com 250 who cites no authority 1 Roll 910

But it seems to be established that Administr. durante de. does not

Will the administrator of one of several executors take a case out of St Lin.ns No. 7 Ct 172. 12 Wheat 565. 2 Burn & Cop 23. Rogerwood. N.P.R 416. Hill 240 Cyc. 21 Pick 343 1 do 192. 5 do 931

such a grant of property in the effects of the deceased as such a grant of authority as an Ex.or or absolute Adm.or has - for his authority is generally given him and commencement of proceeding expressions so that he is in the nature of a bailiff to the Ex.or Ex.or 2 Bac 381 5 Co 29 Cro 718 1 Com. 250 3 Com. 103.) These authorities relate to the case of an Adm.or durante se of an Ex.or only - but Semble his power is the same as that of an Adm.or durante se of an Ex.or entitled to Administ.r - the authority of an Adm.or durante se is generally granted at request and commencement so far bind that always

Yet the his authority is special he may generally do all acts which are incumbent on an Ex.or & which are in legal presumption for the benefit of the estate of the deceased. Ex. He may give his consent to an agency if there are other ofs. suff.t to pay debts & not otherwise except at his peril. 2 Bac 381 5 Co 29 Lewin. 238 3 Bac 487 2 Ro 436.

But he can do nothing to the prejudice of the Ex.or - he cannot sell the goods of the deceased except for payment of debts (which is a case of necessity) or unless they are perishable (5 Co 29 Cro 719 3 Com. 278 2 Bac 381) in which case a bailiff may sell. 3 Com 103 1 Com 250 2 Bac 381.

He cannot make a lease of a term vested in the Ex.or or Adm.or. 2 Bac 381 5 Co 29 Ro. 67 1 Com 250

Exception to this rule where the Administ.r durante se is granted generally inc. not and commendum - here he may lease a term vested in the Ex.or & it is good till the Ex.or attain the age of 17 (2 Bac 381 6 Co 17 Selw 795 Bac 39.) the reason in this case it is not said does that the Adm.or may sell the goods of the deceased except for payment of debts.

Executors and Administrators

Repealing Administration

It was formerly holden in some cases that the Ordinary could not in any case repeal letters of Administration once granted 2 Bac 410 1 Com. 263 1 Sid 179 1 Rol 883 Bay 93 Cro E 45) Now settled that it may be repealed for sufficient causes tho not arbitrarily 2 Bac 410 Lord. 18 Salk. 37 1 Com. 262.

1. When in case of actual intestacy - If Administ.tn is granted on the ground of ~~intestacy~~ supposed intestacy when there is a will which is subsequent on probate of the will Administ.tn must be repealed. Lord. 18. 47 1 Hall 907

2. When in case of actual intestacy Administ.tn is granted to one not legally entitled to it. As to the next of kin to a feme covert excluding the husband - here it must be repealed in favor of the husband - So if granted to a stranger if there are kindred not disqualified. 3 Lev. 22 1 Com. 263 1 Sid 149 4 Burn E. L 236

So if granted to next of kin if there be residuary legatee. 1 Com 263 2 Lev 56 1 Vent 123

3 When obtained by false suggestion or any other fraud it may be repealed - Or when obtained by surprise on the Ordinary - As where he granted it on a wrong suggestion tho possibly not fraudulent. Sta 911 Lord. 19 2 Bac 410 1 Sid. 293 370 2 Ch. 65. 72.

4. If it be obtained in an irregular manner without citing the parties required by law to be cited - Or if obtained without giving security to account here - be within the 14 days he (2 Bac 410 14-40) said in Ch. 64 - 15 days.

So if after Administr.tn granted a new Administr.tn be obtained by fraud without a repeal of the first & the second Admnr. releases his Administr.tn must be repealed the release being void. 1 Com 264 Bac 339 6 Co 19.

5. Administr.tn duly obtained may be repealed in consequence of matter ex post facto - As if the original Admnr. should become a Lunatic or otherwise incapable. 1 Com 263 1 Lev 158 1 Sid 373. 1 Ro Ab 846

So e contra if the person legally entitled is incapable at the Intestate's death & Administr.tn is for this reason granted to another - this Administr.tn may be repealed on the former becoming capable. Lord 19 1 Bam. & L 237 Cro E 460 1. Sid 371

Consequences of a Repeal.

Where the only objection to Administr.tn granted is that it is to a wrong person the grant is but voidable. Bac 38 Ld K 684 Comb. 96

Hence if Administr.tn be regularly granted tho to a wrong person & is afterwards repealed on a citation by the Ordinary all the intermediate lawful acts of the first Admnr. are good - As if he gives the Intestate's goods to another - for this is an act a rightful Admnr. may do - So this case if the first Admnr. was a creditor to the Intestate he may retain like any rightful Admnr. to satisfy his debt. 1 Com 264 Lord. 50 Cro. E 460. 6 Co 18 Mow 396 Bac 38 L. K 684 Comb 96 2 Roa 412.

But if an Admnr. whose letters are repealed by citation make a gift of the Intestate's goods by coming before the repeal the gift is void as against creditors by 13. Eliz - the quad against the subsequ.t Admnr. - Yet if the first Admnr. is set aside on an appeal

to a higher court of Ministr. the act of the first tribunal is taken on the appeal & repeal & supersedeas vacat 6 Co 18. Dod. 50 3 Bl. Rep 128

A repeal on citation is only a revocation of the former letters of administr. but does not affect the original sentence - but a counter sentence on an appeal acts directly on the sentence from which the appeal is taken which is suspended by the appeal & after a repeal considered as if it never had existed (6 Co 18 Dod. 50 Co. Ecc. 4 Bac. 3 Rep. 206 3 Bl. 129 1 Com. 264) Now is the rule in Ecc. Mr. Ch thinks it doubtful (Ray 224 - 2 Leo 90) Note the cases in 6 Co 18 2 Ray 224) where the appeal was after the affirmance in citation -

If the first tribun. in the last case had obtained judgt. against a debtor of the deceased before the appeal the judgt. may be relied against it by lapse of time &c if the debtor is taken in exec. on this judgt. he may be discharged on motion. 1 Com 264 1 Ba 108 2 Lev 149 1 Ld Ray 62 - 10 Ve. 24. 389 2 Ba 412 2 Ral 668 Lyle. 80 Bro Ent 91

Administr. granted by inferior authority as by the Bishop of a county Diocese is void Dod. 38

Agreeable to the rule that a repeal upon citation does not make void intermediate acts it has been decided that if one die intestate & a will is forged & proved as his will & his probate is afterwards revoked & administr. afterwards granted all acts which an Ex. might do remain good. 3 Bl. 126 -

But the rule that after a repeal on citation all bona fide acts (ut supra) remain good applies only to cases of actual intestacy

not when the deceased left a valid will (1 Com. 264 2 Ba 411.) for if the deceased has left an Ex. but the ordinary not knowing that fact grants Administr. & the Ex. afterwards proves the will he shall avoid all mesne acts done by the Admr. for the Ex. had an interest of which the Ordinary could not deprive him - the Ordinary had no authority to grant Administr. as he can grant it only in case of dying intestate & the Administr. is void Buller J. strongly disapproves of this rule 2 Ba 411 1 Com 238 2 64 1 Show 411 Plowd. 277 2 Lev 183 2 Com. 72 2 Ind. 150 1 Vent. 303 3 Hl. 130 Lat 74. 177. Swinb. 380 Lat 27 Dr. 1210

So if the deceased left two wills, the former of which was revoked by the latter & the Ex. of the former proves it yet as the probate of the second by the rightful Ex. all mesne acts by the first Ex. are void (2 Ba 411 Roll 919 Com 152) J. Buller & Gross deny this rule (3 Hl. 130 & Leite 2 Lev 90 Pr. 158) qu. have not the two last cases of intestacy? 2 Ba 411. 12

When the first Administr. is repealed on citation the authority of the first Admr. ceases on the repeal & he is liable for all the acts in his hands to the rightful Ex. &c. as also for all unlawful acts - the lawful acts pending the citation as well as before are valid. 2 Ba 412 1 Com 264 2 Saund 137 Lat 38 6 Co 18

When Administr. is void ab initio or is made void by a repeal on an Appeal all the acts of the first Admr. are considered & may be treated as the acts of a stranger. 3 Ba 411 Plowd 279 1 Com. 264 239. 8. 2 Ind. 152

Yet in the last case if the Admr. has paid debts or legacies

or funeral charges which the rightful Ex^r. or ought to have paid he shall excuse the amount so paid i.e. retain or be allowed so much in mitigation of damages. 2 Ba 411 Plowd 279 1 Ch. R 126 1 Vent. 349 Sty. 338

So where the Administ^n. is void or made so (at suppos) a voluntary payment to the first Adm^r. does not discharge the debtor tho' a release is given - he must pay it over again. (3 Hall. S 3 Hl 130 contra against this rule in case of a repeal of Administ^n. &c on the probate of a will - tho not in case of a repeal of any kind upon a repeal) 2 Ba 411 Roll 919 1 Com 264 1 Vent 349.

But it has been holden that if a debtor pay money on an ex^n. to one who is Ex^r. de facto having a probate under seal he shall never be forced to pay it again - No doubt tho' if paid to an Adm^r. de facto on a just^n. - I know then is the necessity of an Creditor Suscitat. 1 Ba 198 2 Ba 411.

If after Administ^n. granted a second Administ^n. is obtained by fraud without a repeal of the first Adm^r. & the second Adm^r. releases his Administ^n. is repealed the release is void. (1 Com 264 6 E. 19 Sty. 339) qu. except as against creditors. 6 E. 19.

What acts an Executor may do before probate

As an Ex^r. devises all his interest from the will the property of the testator's effects is vested in him on the testator's death before probate - Proving the will is called an necessary ceremony for judially as necessary evidence of the Ex^rs. right. 2 Ba 412 3 Hl 507 1 Com. 238 Went. 33 Plowd 280 1 Roll 919 1 Brist. 292 Godb. 144 Rol 173 1 Leth 460.

Nemo plea that Pff. who sues as Exr. has not proved the will is bad. It should be that he is not Exr. & thus it would be necessary for Pff. to produce the probate. Mutt 31 2 Ba 396 Sect 3.

This evidence of the Exrs. right is necessary it is said because on the probate there is an inventory exhibited & other acts to be done which are for the benefit of creditors & legatees. 2 Ba 412. Sect 303 Mutt 30.

The Exr. as he derives his right from the will may before probate do many acts which will be valid (1 Com 238 2 Ba 412 Vent 33 Godf 114 Leiv. 790 1 Lut 209 1 Roll 917. Mond 281 2 Ow 287.) But an Admr. can do no valid act till letters of Administr. are granted - for he derives his whole authority from the Ordinary. 2 Ba 507 Godf 173 Shim. 87. Sect. 303.

By "valid act," are meant acts affecting the effects - or rights of claimants - there are indiff. which any person may do (qu) Ex. The Exr. may before probate take posses. of testators goods & may enter the heirs house if he can do it without breaking & take securities belonging to testator (2 Ba 412 Sect 173 Godf. 144 Mond. 277. Vent 33 2 Lind. 277.) But he may not break an inner door (Lamb.) for he may not break a chest. Sect. 175

Vs. Before probate he may assent to a legacy & the assent is binding & he may pay debts & receive them - give releases & take them 2 Ba 413 1 Vent. 34. 49. 1 Com 238 Godf. 144 Perk. 481 1 Lut 292 Mutt. 31 Mond 283 5 Co 28 Qu. 39 Sect. 174.

But if one entitled to Administr. should receive debt & give releases before Administr. granted he might after Administr. granted

revive them again - for the right of action was not in him all Ros 119. 26 Brink. 281. 5 Co 26. and Salk 799. Cente 103 Sal 295 Shin. 274 3 Mod 276

So an Ex^r may before probate sell give away or dispose of the goods of the testator - Terms of an Ad^r. 2 Bac 413. Lord 174 Vent. 34. 149 1 Com. 238 Mound. 280

So if a bond of the testator be conditioned for payment at a certain time which happens after testator's death but before probate it must be paid by the day to the Ex^r. or at C.L. the penalty is forfeited 2 Bac 413 Vent 34 Lord 174.

So if the bond were made by the testator the Ex^r must pay it by the day the before probate - or the forfeiture accrues. (Lord 174) Now by 4. Ann. penalties are changed into Bonds of Loan on payment into Court of principal interest & costs. 2 Bac 413. 5th 671.

A person named Ex^r is said to be a complete Ex^r to all to all purposes except that of bringing actions - it is said he cannot bring actions before probate (Lord 301 5 Co 28 Q^n 39 10th 52 Mound. 278. 81 Lord 177 1 Mod. 292 Vent 51 1 Mod 213. 2 Ath Godb. 143 -

Qualifications - 1. It does not apply at all except to the cases - to wit - to actions of debt & other action on testator's contracts & to such actions on torts as accrued in testator's life. Lord. 174

Therefore he may before probate maintain trespass trover replevin &c for injuries done to the effects after testator's death since in those cases he may declare on his own proper^n - & even in this case he may maintain an action in his own name without describing himself as Ex^r. 2 Bac 413. 41 Vent 35. 50

S. to.

his male & female

Major Zachary

Major General Taylor. President Elect. of
the United States. Nov. 7. 1848.

Gen. Lewis Cass. Democratic Convention

left for Salt River. in first boat.

"The noisy confusion" will not prevent
the Steamer from starting -

Lewis Cass.
Captain

1848. Nov. 7